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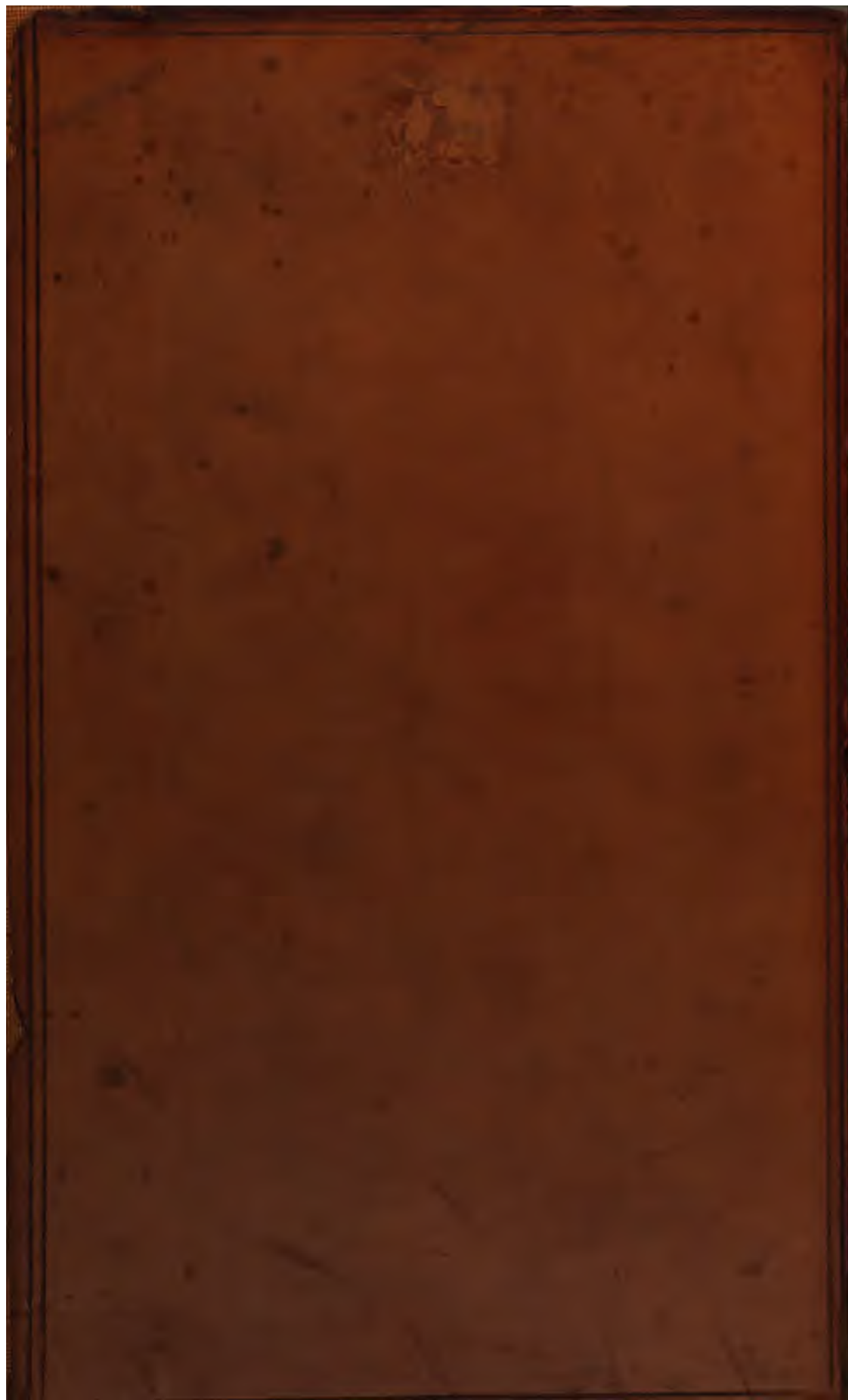
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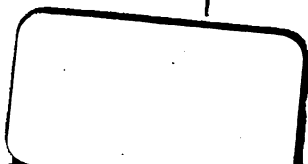
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IRISH EQUITY REPORTS

PARTICULARLY OF

POINTS OF PRACTICE,

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

THE

ROLLS COURT,

AND THE

EQUITY EXCHEQUER,

From Michaelmas 1840, to Trinity 1841, inclusive,

In the Fourth and Fifth Years of the Reign of Queen Victoria.

Chancery:

By R. DEASY, Esq.

Rolls:

By W. B. STOKER, Esq.

Equity Exchequer:

By THOMAS JONES, Esq.

AND

ROSS S. MOORE, Esq.

Bankruptcy:

By JOHN C. DEANE, Esq.

BARRISTERS-AT-LAW.

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JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

HIGH COURT OF CHANCERY.

Lord High Chancellor.—LORD PLUNKET.

Master of the Rolls.—SIR MICHAEL O'LOGHLEN.

COURT OF EXCHEQUER.

Chief Baron.—The Right Honorable MAZIERE BRADY.

Second Baron.—The Honorable RICHARD PENNEFATHER.

Third Baron.—The Honorable JOHN LESLIE FOSTER.

Fourth Baron.—The Right Honorable JOHN RICHARDS.

ATTORNEY GENERAL.

The Right Honorable DAVID ROBERT PIGOT.

SOLICITOR GENERAL.

RICHARD MOORE, Esq.

SERJEANTS.

First Serjeant.—RICHARD WILSON GREENE, Esq.

Second Serjeant.—JOSEPH DEVONSHIRE JACKSON, Esq.

Third Serjeant.—JOSEPH STOCK, Esq., LL.D.

ERRATA & CORRIGENDA.

- Page 26, line 5th from bottom, *for* 'probabilities,' read 'possibilities.'
- „ 226, line 29th from bottom, *for* "primary," read 'primary.'
- „ 327, in note (a) at bottom, *for* 'Bennett v. Fowler,' 2 Beav. 302." read
'Whittle v. Henning, 2 Beav. 396.'
- „ 328, last line, *for* 'Demurrer overruled,' read 'Demurrer allowed.'
- „ 343, last line, *for* 'Jones v. Ham,' read 'Jones v. Ham, *ante*, p. 65.'
- „ 451, last line but one, *for* 'confirmed,' read 'affirmed.'
- „ 575, line 15th from bottom, *for* 'previous claimants,' read 'present claimants.'

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CASES

IN THE

COURTS OF CHANCERY, ROLLS AND EQUITY EXCHEQUER.

STEELE v. MITCHELL.*
(*In Chancery.*)

RICHARD STEELE, the grandfather of plaintiff, being in the year 1770 seized of an undivided moiety of the lands of Ballynard and Ballyconoge, in the King's County, under a lease for lives with covenant for perpetual renewal, executed in the year 1710, demising the entire of the said lands (the other moiety of the lands being then vested in William Brereton for a like estate), by indenture of marriage settlement, executed on the 28th of October 1775, on his marriage with Anne Phillips, in consideration of the marriage, and of the lady's fortune, conveyed his undivided moiety to two trustees, Price and Lawrenson, to the use, after the marriage, of the settlor for life, remainder to the use of the trustees during his life, to preserve contingent remainders; remainder after his decease (subject to an annuity by way of jointure to his intended wife), to the first and other sons of the marriage, *quasi* in tail male.

That settlement contained a power enabling Richard Steele to lease all or any part of the lands for any term not exceeding three lives or thirty-one years, in possession, at the best rent, without taking fine. The settlement was registered shortly after its execution, and George Steele, the father of the plaintiff, was the eldest son of the marriage.

On the 28th October 1777, William Brereton, the owner of the other undivided moiety, by deed of that date, mortgaged that moiety for £500 to Richard Steele, and afterwards for a further sum of £800, on the 2d November 1782, by deed of that date, conveyed the equity of

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June 4, 5,
6 & 25.

A. being seized of an undivided moiety of lands held under a lease for lives renewable for ever, settles the same, to the use of himself for life, remainder to his first and other sons, reserving to himself a power of leasing. He afterwards purchases the other moiety, and makes a lease of the entire, notwithstanding by his power. On the marriage of his eldest son, he conveys the entire to trustees to the use of himself for life, remainder to his son for life, remainder to the sons of his son as the son should appoint; *Held* that the son of

A.'s son could not impeach the lease as to one undivided moiety, as being contrary to the leasing power.

* This case has been reported out of its order, because it was argued before the present Reporter had undertaken the duty of reporting in the Court of Chancery, and he was unable to procure a note of the argument earlier.

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redemption to Richard Steele. Both these latter deeds were registered shortly after their execution.

By deed of the 4th April 1785, Richard Steele leased the entire of lands comprised in the original lease of 1710, to Thomas Mitchell, for three lives, at a rent of £121, with a covenant for perpetual renewal. That lease contained a covenant for quiet enjoyment by the lessee, his heirs and assigns, without disturbance "by any person claiming by, from, or under Richard Steele," and also a covenant for further assurance; but that lease contained no clause of distress or re-entry, nor was a counterpart executed by the lessee. Upon the marriage of George Steele, the eldest son, in 1797, by a settlement executed on the 4th of November in that year, previous to and in consideration of the marriage, Richard Steele conveyed the entire of the lands comprised in the lease of 1710, and all his estate and interest therein to two trustees, in trust, after the solemnization of the marriage, for Richard for life, and after his decease, subject, as to one undivided moiety, to a jointure for the wife of Richard, in the event of her surviving him, to the use of George Steele for life, and after his decease (subject to a jointure for his intended wife), to the use of such of the sons of the marriage, for such estates as George Steele should appoint.

That settlement contained a power enabling Richard Steele to lease all or any part of the lands for any term not exceeding twenty-one years, or for two lives, or for any number of years determinable upon one or two lives, in possession, at the best improved rent, without fine; and R. Steele covenanted against incumbrances, except tenants' leases. A renewal of the original lease was executed to Richard Steele in 1803, one of the lives in which was in being at the time of the filing of the bill.

Previously to 1812, the interest of Thomas Mitchell, the lessee in the lease of 1785, had become vested in his son Andrew Mitchell, and on his decease in his son Thomas Mitchell, then a minor; and the executors of Andrew, on the 29th October 1812, obtained from Richard Steele a renewal of the lease of 1785, in trust, for Thomas Mitchell.

That renewal contained a further covenant for perpetual renewal, but did not contain any clause of distress or of re-entry in case of non-payment of the rent reserved, nor was any counterpart executed by the lessees. On the 3d of February 1820 another renewal was executed by Richard Steele to the executors of Andrew Mitchell, in trust for Thomas Mitchell, his son, who was still a minor, and that in like manner did not contain any clause of distress or re-entry, nor was any counterpart executed by the lessees.

The lands were held under that lease until the death of Richard Steele in August 1835; George Steele, the father of the plaintiff, died in the lifetime of Richard, having by his will, dated the 7th of August 1809, duly appointed the entire of the lands in *quasi* tail, to the plain-

tiff, who obtained renewals of the original lease, and barred the *quasi* estate tail, and on the 1st May 1837 served notice to quit, and having been unable to proceed with an ejectment which he brought, in consequence of one of the lives in the renewal of 1803 being in existence, filed the present bill upon the 3d November 1838, for the purpose of setting aside the lease of 1785, as to one moiety of the premises, as being contrary to the leasing power given by the settlement of 1775, and the subsequent renewals, as contrary to the leasing power given by the settlement of 1797.

The defendant by his answer insisted, that the rent reserved by the lease of 1785 was at that time the full value of the demised premises, and no evidence was given in the cause upon that subject. But it was admitted that in 1812 and 1820, the value of the land was then greater than the rent. The defendant by his answer also insisted, that if the lease of 1785 was void, he would be entitled under the covenant for quiet enjoyment, contained in it, to recover the value out of the assets, real and personal, of Richard Steele; and that as the moiety of the lands purchased by Richard Steele, after the date of the settlement of 1785, was not bound by the trusts thereof, the reversion of said moiety, and the rent incident thereto, ought to be deemed assets in the hands of plaintiff, and liable to make compensation to the defendant in the event of eviction. But no case of election or confirmation, such as was relied on in argument by defendant's counsel, was put forward in the answer.

Mr. *Warren*, Q. C., Mr. *Smith*, Q. C., and Mr. *Napier*, for the plaintiff.

The only defence set up by the defendant in his answer is, that he is entitled to compensation for being evicted from the moiety not comprised in the settlement of 1785, out of the assets of George Steele, the grantor of the lease; that, however, is an equity which they could only establish by a cross bill, bringing the real and personal representatives of George Steele before the Court; and they cannot have the benefit of it in this suit. Their counsel, however, at the bar, have not confined themselves to the defence set up by their client's answer, but contend that the lease of 1785 was confirmed by the settlement of 1797, and that we, having elected to take under that settlement, cannot now disturb the lease. It is extremely inconvenient to have a case set up at the bar, of which there is no trace to be found in the pleadings, as the opposite counsel come prepared merely to argue the case as it appears upon the answer, and the line of defence taken in this case is quite a surprise on them. In addition to that, they contend that as we take under the settlement of 1797 one moiety of these lands, which constituted part of the assets of the grantor of the lease of 1785, and as we had notice of this lease, we are bound by the covenant for quiet

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enjoyment on the part of Richard Steele contained in it, and cannot be permitted by a Court of Equity to do an act which would render the representatives of Richard liable for a breach of that covenant. With respect to the former defence, the settlement of 1797 does not confirm the lease, nor was it intended to confirm it. In the case of *Doe dem. Potter v. Archer* (a), where the premises had been sold by a remainder-man expressly subject to a lease for twenty-one years, granted by a tenant for life without a leasing power, although the premises were described, in the conveyance to the purchaser, as in the possession of the tenant under that lease, and it was excepted in the covenant against incumbrances, yet it was held that the purchaser was entitled to evict the lessee. In *Cosherell v. Cholmondeley* (b), a defendant, who with the knowledge of facts, which rendered a sale, by a prior tenant for life, and the trustees of the will under a power of sale, voidable, lay by during the life of that tenant for life, and acquiesced in an application to parliament respecting the dispositions of the purchase-money, was held not to be prevented by it from recovering the estate from the purchaser; and the Master of the Rolls (Sir J. Leach) in his judgment in that case says—"In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law; and here there is no proof that the defendant, at the time of the acts referred to was aware of the law upon the subject, nor was it even alleged in argument" (c). In *Murray v. Palmer* (d), an acquiescence by the party seeking to impeach a sale, and receipt of interest for twelve years, were held not to amount to a confirmation; and Lord Redesdale, in his judgment in that case (p. 486), lays it down, that in order to amount to a confirmation, an act done must have been done with the knowledge that the effect of it will be to confirm a transaction which that party has a right to impeach; and in *Dunbar v. Tredennick* (e), the doctrine as to confirmation is laid down in nearly the same terms by Lord Manners.

Secondly, as to there being an election in this case, they say on the other side, that Richard intended to confirm this lease by the subsequent settlement, and that George Steele, under whom plaintiff claims, having derived and enjoyed benefits under that same settlement, cannot now disturb the lease. In order to raise a case of election against the owner of any particular property, it must be clear that the person who gives other benefits to that owner, intended to give this property to a third

(a) 1 Bos & Pul. 531.

(b) 1 Russ. & M. 418.

(c) *Ibid.* 425.

(d) 2 Sch. & Lef. 474.

(e) 2 B. & .B. 317.

party. Election cannot be raised unless by express words, or by implication as strong as if express words had been used (a). They ought to shew an intention on the part of George to confirm this lease, as clearly as if he had said "I confirm this estate," before they can call on those claiming under him to elect. In the settlement there is not a word about this lease; there is only a general clause, excepting out of the covenant against incumbrances, the tenants' leases. This is a case of contract, and the rights of the parties must be governed by the express terms of it; in wills, the intention on the part of the testator, to give away the estate from the family, is required to be clearly manifested. In *Birmingham v. Kirwan* (b), Lord Redesdale expresses the rule thus, "The general rule is, that a person cannot accept and reject the same instrument; and this is the foundation of the law of election, on which Courts of Equity, particularly, have grounded a variety of decisions, in cases both of deeds and of wills, though principally in cases of wills, because the former being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires." Admitting even that there was a case of election raised by the settlement, yet nothing has been done by the plaintiff here, or those under whom he claims, to shew that they have elected. In order to constitute an actual election, the acts of a party bound to elect between two inconsistent rights, must imply a knowledge of his rights and an intention to elect, and when those acts are equivocal, they will not amount to an election (c). In this case George Steele, the father of plaintiff, died in the lifetime of Richard, and therefore no act of his can be relied on; and immediately after the death of Richard, the plaintiff commenced proceedings to evict this lease. The doctrine in *Taylor v. Stibbert* (d), which has been relied on by the defendant, does not apply to the present case, because the eviction of the defendant would impose no liability on the assets of Richard.

Mr. *W. Brooke*, Q. C., Mr. *Collins*, Q. C., and Mr. *Lewis*, for defendant.

As to the objection that we have not stated in our answer the defence we rely on in argument, a defendant is not bound to set out in his answer every ground on which his counsel may rely in argument. The answer must raise every question of fact, but when the Court has the facts before it, it will adjudicate upon the law. The bill does not charge that the lease of 1785, is contrary to the leasing power in the settlement of 1775, except so far as the covenant for perpetual renewal. No evidence has been given that the rent reserved in that lease was less than the value of the land at the date of the lease. It is true that it is

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(a) *Dashwood v. Peyton*, 18 Ves. 27.

(c) *Dillon v. Parker*, 1 Swan. 359.

(b) 2 Sc. & Lef. 450.

(d) 2 Ves. jun. 445.

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admitted that when the renewal of 1812 was executed, the rent was less than what the lands would then have set for, but the defendant, in his answer, alleges that the increase in the value in the interim arose from the expenditure of his father, and no evidence has been given to contradict that. But what we principally rely on, is the confirmation which was the result of the settlement of 1797. Under that settlement George Steele was benefitted to a considerable degree, and he, and those claiming under him, cannot do any act which would impose a liability upon the assets of Richard, from whom they derived that benefit. If a party makes a lease which his estate does not warrant, and covenants with the lessee to indemnify him, no one taking an estate from him can impeach that contract. That is the principle of the decision in *Taylor v. Stibbert* (a). It is a reasonable account of such a transaction, that the vendor should stipulate with the purchaser not to throw any liability on him; and in a family settlement, such a stipulation with a son is in accordance both with law and the probable intention of the parties. On the other side they seek to distinguish this case from *Taylor v. Stibbert*, on the ground that in that case the vendor was responsible for a breach of covenant in case of eviction, and that we are arguing on a false supposition, because there is no liability imposed upon the assets of Richard. We admit that our case rests on such supposition, but it is one in which we are sustained by the authorities. In *Hurd v. Fletcher* (b), a lessor covenanted for quiet enjoyment by the lessee, without any disturbance by him, "or any persons claiming or to claim, by, from, or under him." The lessor and his wife were seized in fee in right of the wife; and before the execution of the lease, by a fine and deed, declaring the uses of it, had settled the estate on the husband for life, with a power to him to lease and, a joint power of revocation to husband and wife, which they afterwards executed, and settled the estate to new uses; the lessee was evicted by a party claiming under the exercise of the power of revocation: and Lord Mansfield held clearly, that as the husband was a necessary party to the declaration of uses, the party claiming under them claimed under him, within the meaning of the covenant. So in *Evans v. Vaughan* (c), where a party who had settled his estate on his marriage, upon himself for life, remainder to his first and other sons in tail, granted a lease not warranted by his leasing power, and covenanted for quiet enjoyment by the lessee, without disturbance by any one claiming "by, from, or under him," an eviction by a remainder-man under the settlement was held to be a breach of that covenant. The leading case upon this subject is *Buller v. Swinnerton* (d), which has been called "the magna charta" of covenants for quiet enjoyment. Sir John Swinnerton took a conveyance

(a) *Supra*.

(b) 1 Doug. 43.

(c) 4 B. & C. 261; and 6 D. & R. 349.

(d) Palmer, 339.

to himself and his wife, and his heirs, and afterwards made a lease for twenty-one years, covenanting with the lessee for quiet enjoyment, without interruption by him, "his heirs, executors, or administrators, "or by or through any other by his means, title, or procurement." After the death of Sir John, the lessee was evicted by the wife, and it was held that the covenant was broken. In *Lewis v. Swift* (a), specific performance of a covenant for renewal made by a person having a limited interest in the estate, with a power of appointment, was enforced against a party deriving under one in whose favor the power had been exercised, and to whom the donee had given her personal estate. It is sought to distinguish this case on the ground that there is no covenant by George Steele: but that is immaterial: there was an agreement by all, that the lease should be good against all parties deriving under the settlement. Our argument is founded rather on exception than covenant. There is a very full covenant by Richard for quiet enjoyment, and an express exception out of that covenant of the tenants' leases. Now, a party purchasing an estate which is not in the possession of the owner, is affected with notice of every interest to which the tenants in possession are entitled. *Crofton v. Ormsby* (b). The same doctrine is laid down by Lord Rosslyn, in *Taylor v. Stibbert* (c), and by Lord Eldon, in *Daniel v. Davison* (d), where it was held to be notice not only of the interest which the person in possession had as tenant, but even of an agreement which he had entered into with the landlord for the purchase of the premises; and also in *Allen v. Anthony* (e), where it was held to be notice of a right in the tenant to the timber, although such right was acquired after the title by which he held possession.

Mr. Napier, in reply.—Under the settlement of 1775, George Steele would clearly be entitled to evict the lease at law, for it was void as against him, and not merely voidable, and could not therefore be set up by any supposed confirmation on his part (f). "Confirmation doth not "strengthen a void estate" (g). Such eviction however would be an eviction by title paramount, and not by any one claiming under Richard. *Hurd v. Fletcher* has no application, and *Evans v. Vaughan* rested entirely on *Hurd v. Fletcher*; and the form of the covenant was remarkable there, extending to the acts of any of his ancestors. In *Lewis v. Swift* the covenant was enforced against the party claiming under the execution of the power, on the ground that when the donee of the power gave

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(a) 1 Jones, 422.

(b) 2 Sch. & Lef. 431.


(c) *Ante*.

(d) 16 Ves. 249.

(e) 1 Mer. 282.

(f) Co. Lit. 295. (b).

(g) Com. Dig. Confirmation D. 1, and ib. D. 4.

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her personal estate to him, she did not mean that he should have the power of disputing her acts, and the Chief Baron (Joy) in giving judgment, p. 430, says, "The question therefore finally is, did Elizabeth Swift when she gave her personal estate to W. L. Swift, mean that he should have her power of disputing her acts. From the case of *Taylor v. Stibbert* it is clear that a person cannot take the benefit of an estate and avoid the acts of the grantor." In the case of *Stoney v. Saunders*, which is stated in the argument in *Popham v. Baldwin* (a), a renewal was decreed against the issue in tail claiming under a settlement paramount to the estate of the covenantor, on the ground that he took from the lessors other property admitted to be of greater value than the lease. The doctrine of confirmation was not even adverted to in these cases, they were decided on an equity arising out of the contract, and in order to prevent circuity of action. The case of *Cockerell v. Cholmondeley* (b), is not applicable to the present. There, there was not the most remote suspicion that the sale was void, when the acts, which were relied on as a confirmation, were done. That, and the two Irish cases, were decided because it did not appear that there was any notice that the act was voidable. A distinction has been attempted in this case, on the ground that the eviction of the defendant would be a breach of the covenant for quiet enjoyment. A covenant for quiet enjoyment does not extend to eviction by title paramount; *Merrick v. France* (c); *Line v. Stephenson* (d). Besides, none can take advantage of a deed but those who are parties to it, and in the last renewal the covenant, is with the trustees of the defendant by Richard Steele. The covenant to renew is a mere personal covenant, and only binds assignees of the covenantor in the lands in question. In the *Duchess of Chandos v. Brownlow* (e), the registry of a lease with a covenant for quiet enjoyment, was held not to bind the assignees of the reversion under a prior deed which was not registered. The covenant for renewal derives its chief value from the equitable doctrine of enforcing it specifically. But specific performance of this covenant would never be enforced against Richard Steele, because it would be contrary to his power, and a Court of Equity will not decree a party to do an act which he is not lawfully authorised to do, not only because it would be laying the foundation of an action at law, but also, because it is injuring a third person, by creating a title with which he may have to contend, *Harnett v. Yielding* (f). If then the lease were void at law, and the covenant would not be enforced specifically in equity, how can it be contended that it has been confirmed? Any confirmation could not have been for more than the first three lives, as it did not in law or

(a) 2 Jones, 331.

(c) 4 Taun. 329.

(e) 2 Ridg. P. C. 415.

(b) *Ante*.

(d) *Ibid*. 459.

(f) 2 Sch. & Lef. 548.

equity extend beyond that. The exception in the covenant against incumbrances of leases, referred only to leases *bond fide* made, and not to those which were void and fraudulent, both at law and in equity. The covenant itself could only extend to incumbrances which would affect the lands in the hands of the trustees, and not to personal covenants which could not affect the trustees' estate, derived under the settlement. Now an exception is ever part of the thing granted, and a thing *in esse* (a). The covenant was for the benefit of the trustees, why should it abridge their estate? The deed of 1797 was equivalent to a recovery, which would only let in the charges of the tenant in tail (b). In *Burke v. O'Malley* (c), tenant for life and remainder-man in tail suffered a recovery to the use of the tenant for life, for his life; remainder to the remainder-man in tail for his life; remainder to his first and other sons in tail. Judgments were obtained against the remainder-man, and afterwards the deed to lead the uses was registered, and it was held that the judgment creditors did not obtain a lien against the estates vesting in the issue of the remainder-man in tail. As to the doctrine that the possession of the tenant is notice to a purchaser, of his interest, that is not actual, but constructive notice; it renders it the duty of the purchaser to inquire; *Powell v. Dillon* (d): but for confirmation, actual knowledge is necessary. In *Boylan v. Warner* (e), Joy, C. B., says, "In *Taylor v. Stibbert*, the equity in favor of the plaintiff flowed out of the "covenant for renewal which was in his lease, rather than from notice to "*Stibbert*." The principle of compensation does not apply here, because neither plaintiff nor George Steele takes this undivided moiety under or from Richard the covenantor. The principle is, that you shall not take the property in dispute, that is, the settled moiety, under the covenantor, and, by doing so, burden his assets. But the plaintiff here takes no property of Richard, which by any legal proceeding could be made liable to this demand of defendant, for breach of any covenant. *Taylor v. Stibbert* only applies when the party takes the very property in dispute, and takes it from the covenantor.

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The LORD CHANCELLOR.

In this case the bill prays that the lease of 1785, and the renewals afterwards obtained, may be declared void as to one moiety of the lands comprised in it, as being contrary to the leasing power contained in the settlement executed in 1797, on the marriage of plaintiff's father. The material facts of the case are these—Richard Steele, the grandfather of plaintiff, was seized of the moiety of these lands which the plaintiff now

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(a) Co. Litt. 47 (a).

(b) 2 Saun. 42 (a)

(c) Beat. 96.

(d) 2 B. & B. 421.

(e) Hayes & Jones, 83.

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seeks to have discharged from this lease, under a lease for lives renewable for ever; and he, on his marriage in 1775, settled that moiety to the use of himself for life, remainders to his first and other sons *quasi* in tail. That settlement contained a power enabling Richard to lease the lands for any term, not exceeding twenty-one years, or for one, two, or three lives; and the only restriction upon its exercise was, that the leases should be at the best and most improved rent, without taking any fine. George Steele was the eldest son of that marriage, and entitled, under the provisions of the settlement, to a *quasi* estate tail. Subsequently to the settlement, Richard Steele acquired the entire interest in the other moiety, by purchase, in November 1782. In this state of things, Richard Steele, on the 4th November 1785, leases the entire of the lands to Thomas Mitchell, under whom the defendant derives, for three lives, with a covenant for perpetual renewal. That lease contains a covenant, on the part of R. Steele, that Mitchell shall hold the lands without disturbance by him or any one claiming under him; and also a covenant for further assurance on the part of Steele. The lease does not contain any reference to the settlement of 1785, nor does it purport to be executed in pursuance of any power. It is clear that this lease was not warranted by the leasing power in the settlement; and it is equally clear, that if Mitchell's possession under the lease were evicted, the assets of Richard would be liable to make compensation for such eviction, unless the eviction were by a title paramount to that of Richard. Then comes the deed of the 4th November 1797; and by that deed, the entire of the lands leased to Mitchell were settled, to the use of Richard for life, with remainder, subject to a jointure for his wife, to George, his eldest son, for life; and after the decease of George, to the use of such of his sons as he should by deed or will appoint, charged with a jointure for the wife of George. George died in 1807, in the lifetime of his father, having appointed the lands to the plaintiff; and Richard died in 1835. An ejectment is then brought by the plaintiff, on the ground that the lease was not warranted by the leasing power; but in consequence of the existence of a legal bar, he is obliged to come into this Court. It is admitted, on the part of the defendant, that the lease is not warranted by the power; and the only question in this cause is as to the effect of the deed of 1797 upon the lease. The defendant, in his answer, relies upon the covenant in the lease, as entitling him to compensation out of the assets of Richard the lessor. For that, however, he should have filed a cross-bill, and it has been admitted by his counsel, that such an equity cannot be made available in this suit. The facts stated, however, raise the question, whether the plaintiff, who has taken the benefit of the deed of 1797, and now enjoys the entire of those lands under it, can avoid an estate created by the settlor in that deed, and thereby throw upon his assets

the liability for a breach of the covenant, which will be occasioned by the destruction of that estate; and whether that question is now open to the defendant? Now, although the defendant has not set up this defence in his answer, but has relied on another, yet, as all the facts are brought before the Court, I feel myself bound to give him the benefit of that defence, and to consider the effect of the deed of 1797. There cannot be any doubt that Richard considered himself the absolute owner of the entire of the lands, and, as such, he conveyed them to the trustees of the settlement of 1797, and under that settlement plaintiff derives as a purchaser for valuable consideration. If he were not a purchaser, no question could arise, for he clearly would have no right to disturb the lessee if he were merely a volunteer; and that makes it necessary to consider the covenant for quiet enjoyment in the lease of 1784, in order to ascertain whether an eviction by plaintiff would be a breach of that covenant. Now, in my opinion, the cases which have been cited, of *Hurd v. Fletcher* (a), and *Evans v. Vaughan* (b), are quite conclusive upon the subject; and after those decisions, as it appears to me, expressly upon the point, I do not think I would be justified in sending a case upon the subject to a Court of Law. Now, if that be so—if an eviction by plaintiff here would be a breach of that covenant, and render the assets of Richard liable for the breach—the doctrine in *Taylor v. Stibbert* is precisely applicable. That doctrine is this, that if a tenant for life make leases not warranted by his power, a party purchasing from him, with notice of those leases, shall not be permitted afterwards to evict them, and thereby render the assets of the tenant for life liable for that eviction. Sir Edward Sugden, in his work on *Vendors and Purchasers*, speaking of the case of *Luffkin v. Nunn* (c), says, that if in that case the tenant could have recovered for a breach of covenant for quiet enjoyment, the landlord would have been compelled to perform the agreement; and he distinguishes that case from the case where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant, and then joins with the remainder-man in selling the inheritance. There, he adds, “Equity rightly holds the purchaser bound by the agreement.” (d). Now, in those observations I fully concur; and as the plaintiff here has totally failed in shewing that this lease is impeachable, otherwise than as contrary to the leasing power, I must dismiss his bill; and I should give the defendant the costs of the dismissal, but that he has so imperfectly stated his case in his answer. Under these circumstances, therefore, I shall

Dismiss the bill, without costs.

(a) *Ante*,

(c) 11 Ves. 170.

(b) *Ante*.

(d) 2d vol. 271, 9th ed.

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The decree declared that the estate therein mentioned was divisible into three parts, and that the younger children of A., B. and O. were severally entitled to a third. O. was largely indebted to the estate, and a sequestration issued and continued against him until his death; by means of which certain sums were brought in from time to time and allocated according to the rights of the parties. Two of O.'s younger children died before any of the funds were allocated, and the Master's report found that certain sums (being their shares of the fund then in bank) were payable to their personal representatives.

O. became entitled as executor and sole legatee of one of his deceased children, and as administrator and sole next of kin of the other, to both their shares, but made no claim, there being a sequestration against him. He died owing a large balance to the fund, and the proportion of that balance to which his own younger children should have been entitled, exceeded the amount of the aforesaid shares.

T., another of O.'s younger children, having become legal personal representative of his deceased father and brothers, now applied for the aforesaid shares, after payment of the costs due to their solicitor.

Held:—that when O. became entitled to this money, it was attached for the purposes of the decree by the sequestration against him, and should not now be paid out to his representative.

There were ten younger children of O., all of whom appeared and proceeded jointly by the same solicitor, and incurred costs to a considerable amount. The surviving children were allowed by the solicitor to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable; and he now applied for payment out of the sum in bank (*i. e.* the shares of the two deceased children) of the entire amount of the costs.

Held:—that the shares of the two deceased children were liable in the first instance for that proportion only of the costs which they should have paid if the others had contributed equally; and that it was the duty of the solicitor to have taken care that the costs should be borne equally by the several younger children.

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(In the Rolls.)

THE decree in this cause, made the 14th of February 1811, declared that the residue of the estate of the testator John Crone was divisible into three parts; of which the interest was payable to the testator's three children for their lives, and the principal to their respective younger children:—*viz.*, one-third to the plaintiffs, the younger children of Robert J. Crone; one third to the defendants, the younger children of Constance, wife of George Massy; and one third to the ten younger children of Aphra, wife of Colonel William O'Dell, who with their father were also defendants in this cause.

Upon taking account of the assets of John Crone under the aforesaid decree, the Master reported Colonel William O'Dell indebted thereto in the sum of £23,977; and upon the return of the report, it was decreed on the 19th of July 1819, that Colonel O'Dell should bring in that sum with interest. A sequestration afterwards issued against him for non-performance of this decree; by means of which, a part of the sum ordered was brought in, but the defendant remained indebted to the fund in a large amount.

Pursuant to two several allocation orders, the fund realised by means of the sequestration was paid to the several parties entitled, with the exception of the shares of two of the younger children of Aphra O'Dell, *viz.*, Henry O'Dell, and William O'Dell, jun., both deceased; which shares, amounting to about £1000, reported to their respective representatives, was the subject of the present question.

Henry O'Dell bequeathed his property to his father Colonel O'Dell, who as executor proved the will in the year 1826. William O'Dell, jun., died intestate and unmarried, and his father, Colonel O'Dell, as his sole next of kin obtained administration of his effects. Colonel O'Dell,

though so entitled, never claimed the shares reported payable to the representatives of his deceased sons, and died, in 1832, indebted to his own younger children to an amount exceeding the sum now in bank, but similarly indebted to the plaintiffs and defendants, the younger children of Robert J. Crone and of Constance Massy, to the extent of their several proportions of the sum in which he was indebted to the estate of the testator John Crone.

Robert D. O'Dell, another of the younger children of the said Aphra O'Dell, became legal personal representative of his deceased father, and of his two deceased brothers Henry and William, whose next of kin now appeared to be their surviving brothers and sisters.

The ten younger children of Aphra O'Dell appeared in this cause, and proceeded jointly by the same solicitor, to whom a considerable sum was due for the costs incurred on their behalf. But all of them, excepting Henry and William O'Dell, had drawn their respective shares of the fund without any claim of the solicitor or any deduction being made on account of the costs. An order of reference to the Master was lately obtained by Robert D. O'Dell, to ascertain the amount of the costs payable to the solicitor of Henry and William O'Dell, in the hope, as it seemed, that after liquidation of the solicitor's claim, the remainder of the fund should be payable to Robert D. O'Dell, as representative of the said Henry and William, to be divided by him with his brothers and sisters.

Upon the reference, the plaintiffs insisted that as Colonel O'Dell had become entitled to the fund in bank as the representative of his sons Henry and William, it should be applied in liquidation of the debt due from him to the assets of John Crone, and be divided into three parts pursuant to the decree. Whereas Robert D. O'Dell insisted that as personal representative of Henry and William O'Dell, he was entitled to receive the funds reported to them after payment of the costs due to their solicitor. It appeared that the sum of £265. 18s. 6½d. was due to the solicitor of the younger children of Aphra O'Dell. The Master reported the foregoing facts specially, and submitted to the Court the question whether the fund should be applied in the manner contended for by the plaintiffs, or as insisted on by the defendant Robert D. O'Dell.

Mr. Collins, Q. C., with whom was Mr. Burroughs, for Robert D. O'Dell, now moved that the Accountant General might out of the government new 3½ per cent stock, &c., transfer to Mr. Hewson the solicitor so much as would be equivalent to the sum of £265. 18s. 6d. the amount of the costs mentioned in the report, and also transfer the residue of the said stock, to the said Robert D. O'Dell, as personal representative of Henry O'Dell and William O'Dell deceased.

They submitted that the Court could not administer the assets of Henry and William O'Dell in a summary way, nor take the administration

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of them out of the hands of Robert O'Dell, the legal personal representative, whose solvency was not questioned, and who was ready to act; *In re Francis Blacker (a)*; *Tenant v. Tenant (b)*. Even though the fund should be considered as the property of Colonel O'Dell, yet the Court could not in this summary way administer his assets. It appears from the Master's report that Colonel O'Dell was indebted to his own children in a sum exceeding the amount of this fund. Although he was in like manner indebted to the plaintiffs, he was also indebted to other persons not in any way before the Court. The claims of the judgment creditors cannot be overlooked in order to pay simple contract creditors. The personal representative of Colonel O'Dell should not be deprived of his right of retainer. Why should he not be permitted to pay himself and his brothers and sisters, in preference to other creditors of equal degree? The executor of an executor is entitled to retain; *Thompson v. Grant (c)*; so is an administrator *de bonis non*; *Weekes v. Gore (d)*. Money in the funds cannot be taken in execution at law, nor can a Court of Equity attach property of that description; *Dundas v. Dutens (e)*; *McCarthy v. Gould (f)*. As to the costs due to the solicitor of Henry and William O'Dell, there can be no doubt that they must be paid in the first instance.

[MASTER OF THE ROLLS.—Why do you charge the costs of the ten younger children of Mrs. O'Dell against the shares of two of them only?]

Their liability was joint and several; and we conceive that the Master's report, unexcepted to, is conclusive as to the solicitor's right to have those costs out of the fund now in bank.

Mr. Brewster, Q. C., and Mr. Hughes for the plaintiffs.—The costs were taxed in the absence of the parties interested. Mr. Hewson had no right to throw the entire burden of them upon Henry and William O'Dell; at least, by permitting the younger children to draw their shares of the fund without deduction, he has waived any claim as against the shares of Henry and William beyond their proportion of the costs.

As to the residue after payment of costs, we submit that it must be divided into three parts, and distributed according to the rights of the parties entitled under the decree. It was part of the fund brought in from time to time by means of the sequestration against Colonel O'Dell,

(a) 4 Law Rec. O. S. 178.

(c) 1 Russ. 540, n.

(e) 2 Cox, 237,—1 Ves. jun. 196.

(b) 1 Cr. & D. 241.

(d) 3 P. Wms. 184, n.

(f) 1 Ball & B. 387.

who was arrested and remained in prison until his death, and died largely indebted to the estate to be administered under the decree in this cause. As personal representative of his deceased sons Henry and William, he became entitled to their shares, which were thereupon attached by the sequestration against him. For this reason he made no claim; therefore, his personal representative cannot have as against this fund any right of retainer. Money in bank may be attached in equity; *Simmonds v. Lord Kinnauld* (a); *Pelham v. Duchess of Newcastle* (b). The present case is not distinguishable in principle from *Hodgens v. Wheeler* (c).

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By the decree of 1819, William O'Dell the elder was ordered to bring in £23,977, with interest, to be divided equally between three families. A sequestration afterwards issued against him for non-performance of the decree; whereby portions of the money were brought in from time to time and distributed according to the rights of the parties. One-third of the fund thus realised was to be sub-divided amongst the younger children of William O'Dell the elder. Two of those children, namely, Henry and William O'Dell, died before the allocation. Henry made a will, whereby he bequeathed his property to his father; William died intestate. Colonel O'Dell proved the will of Henry, and as sole next of kin took out administration to William, and thus became entitled to the shares of both; but there being a sequestration against him, he made no claim. It is not suggested that Henry gave any other legacy than that to his father, nor that he or his brother William left any debts. Colonel O'Dell died in 1833, intestate, and largely indebted to the estate to be administered under the decree in this cause. His son Mr. Robert O'Dell, another of the younger children, has taken out administration to him, and also to his deceased brothers, and now, as their personal representative applies that the residue of the fund in Court, after discharging the costs due to the solicitor of Henry and William O'Dell, may be paid out to him. I cannot grant that application. I think that as soon as Colonel O'Dell became entitled to the fund it was attached for the purposes of the decree, by the sequestration against him; and that this case is within the principle of the decision in *Hodgens v. Wheeler*.

As to the costs due to Mr. Hewson, I regret that he did not take care to make the several younger children of Colonel O'Dell contribute to them equally. Although their liability was joint and several, as has been said, yet their solicitor should not prejudice the interests of

(a) 4 Ves. 735.

(b) 3 Swanst. 290, n.

(c) 1 Saussé & Sc. 443.

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one for the advantage of another ; and I am clearly of opinion that I can now order to Mr. Hewson only that proportion of the costs which Henry and William O'Dell should have been liable to pay, if all of the younger children had contributed equally.

ORDER :—It appearing to the Court that William O'Dell the elder, one of the defendants in this cause, who was by the decree in this cause, bearing date the 19th day of July 1819, ordered to bring into Court to the credit of this cause the sum of £23,977. 15s. 6d. with the interest as therein mentioned, and against whom a sequestration issued to enforce performance of the said decree, became entitled as the personal representative of his two sons, William O'Dell the younger and Henry O'Dell, to their shares of the funds in the Bank of Ireland to the credit of this cause, which were produced by means of the said sequestration so issued against said William O'Dell ; and it not appearing that there are any debts of the said William O'Dell the younger, or Henry O'Dell, or any legacy bequeathed by said Henry now due, the Court doth refuse to make an order for payment to the said Robert Dean O'Dell as the personal representative of said William O'Dell the elder, to the prejudice of the plaintiffs and the other persons who have demands under the decree in this cause against the said William O'Dell the elder ; and the Court doth further declare that only so much of the said sum of £265. 18s. 6½d. reported due to the said John M. Hewson for the costs of the younger children of said William O'Dell the elder, as between solicitor and client, as were properly chargeable against the said William O'Dell the younger, and Henry O'Dell, two of the said younger children, ought to be charged against said funds in the first instance ; and it appearing that there were ten such younger children, the Court declares that one-fifth part of said costs, amounting to the sum of £53. 3s. 8d. is the sum properly chargeable against said funds in the first instance for said costs ; and accordingly the Court doth order that the Accountant-General of this Court do draw on the Governor and Company of the Bank of Ireland in favor of the said John M. Hewson for the said sum of £53. 3s. 8½d. ; and that the sum of £100, set apart for the costs of the order bearing date the 31st day of January 1839, the reference thereby directed, the report bearing date the 12th day of June 1840, and of this application, be impounded until said costs shall have been taxed, with liberty to the said John M. Hewson to apply in relation thereto as he may be advised, when said costs shall have been taxed ; and the Court

doth declare that the residue of the funds mentioned in the said report to be now in the said bank, after deducting such sums for costs, and any further sum that said costs when taxed may amount to, and also the costs of obtaining letters of administration to the said William O'Dell the elder, and William O'Dell the younger, and of the probate of the will of Henry O'Dell, and of such debts of said William O'Dell the younger, and Henry O'Dell (if any) as are still unpaid, ought to be distributed in execution of the said decree, as follows; that is to say, one third part thereof to be applied in payment of the debt due from William O'Dell the elder, to the plaintiffs, the younger children of R. F. Crone; one other third, in payment of the debt due by him to the younger children of Constance Massy; and the remaining third, in payment of the debt due to his own younger children. Accordingly it is ordered, that it be and is hereby referred to Thomas Goold, Esq., the Master in this cause, to inquire and report the amount of the said costs of obtaining such letters of administration and probate, and also to inquire and report whether there is any debt of the said William O'Dell the younger, and Henry O'Dell respectively, or any legacy of the said Henry O'Dell still unpaid, and if so, to whom and the amount thereof; and that he do set apart a sum sufficient to pay such costs and such debts and legacies, if any, as he shall find to be due, and certify to whom the same should be paid; and that he do allocate the residue of the said funds, after deducting such costs and such debts or legacies (if any) according to the rights of the parties as declared by this order, and that he be at liberty to cause advertisements to be published requiring all parties claiming to be creditors of the said William O'Dell the younger, and Henry O'Dell respectively, or legatees of the said Henry O'Dell, to come before him and prove their demands; and the said Accountant-General is to take notice that the said cash so ordered to be paid out is subject to the Usher's poundage.

1840.
Rolls.
CRONE
v.
O'DELL.

JAMES REDMOND BARRY and JAMES BARRY GIBBONS,
Executors of WILLIAM LANE, deceased,

v.

EUSTACE STAWELL, WILLIAM WISE, and others.

1840.
Rolls.

Same Plaintiffs v. Same Defendants.

Nov. 3.

(*In the Rolls.*)

The plaintiffs had a decree for a sale, &c., but were thereby ordered to pay the costs of W., who had disclaimed, and as to whom the bill was dismissed. Shortly after the decree, W. died before his costs had been taxed or furnished. The plaintiffs continued to proceed in the cause as if no abatement had taken place, and in two years after W.'s death obtained out of the produce of a sale under the decree, the full amount of their demand and costs.

Subsequently, W.'s administrator proceeded to have W.'s costs taxed, and the plaintiff's solicitor attended upon the taxation, but protested against the proceeding, as W. had died before taxation, and the suit had not been revived by or against his administrator. The Master, however, taxed the costs, and (after allowing the plaintiffs a certain time for raising their objection by an application to the Court, which they declined to make, but still insisted upon their objection) certified that he had done so in the presence of the plaintiffs' solicitor, &c.; and thereupon W.'s administrator issued and served upon the plaintiffs a subpoena for the costs.

The plaintiffs now moved to set aside the subpoena for irregularity. *Held* :—That the motion should be refused; and that it should have been refused with costs but for the case of *Averall v. Wade*, 1 Moll. 571, n., which it was declared ought not to bind this Court.

Semble, the more proper course for W.'s administrator would have been, instead of issuing a subpoena, to have applied to the Court, after the taxation, for an order upon the plaintiffs to pay. As to the case of *Jupp v. Geering*, 5 Madd. 325—*Quære*.

THIS was a creditors' suit. The original bill was filed by one William Lane against Eustace Stawell and others, to raise, by sale of the defendant Stawell's lands, the sums due on foot of two judgments recovered against him, in respect of which the plaintiff had issued *elegits*, and obtained special findings thereon. In June 1823, there was a decree to account; and in some time afterwards Lane died, having by his will appointed as his executors the above-named complainants James Redmond Barry and James Barry Gibbons. They proved his will, and on the 1st of May 1833, filed a bill of revivor and supplement against the defendant Stawell, and one William Wise and several others. Wise filed an answer and disclaimer. The plaintiffs afterwards amended their bill, still retaining Wise as a defendant. He filed a further answer and disclaimer, but was nevertheless continued to the hearing.

On the 11th of June 1836, there was a decree in the supplemental cause, giving the plaintiffs the benefit of the former proceedings, &c.; and the Master afterwards reported prior incumbrances, &c.; and further reported that the sum of £1707. 9s. was due, on foot of the above-mentioned judgments, to the plaintiffs Barry and Gibbons, as executors of Lane.

On the 30th of January 1838, there was final decree in the original and supplemental causes, whereby the defendant Stawell was decreed to pay the several sums reported (which were declared to be charges upon the lands in the pleadings mentioned), with costs; and in default of payment, the lands were to be sold, and out of the produce of the sale the plaintiffs and other incumbrancers to be paid, and to have their costs in equal priority with their demands; and it was further decreed,

that the plaintiffs Barry and Gibbons should pay to the defendant Wm. Wise his costs of the supplemental cause, to be taxed by the Master, *but that they should not have any demand over against the fund for those costs.*

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Rolls.
BARRY
v.
STAWELL.

On the 22d of February 1838, the defendant Wise died, before his costs had been taxed or furnished, and one Richard Buist obtained letters of administration of his effects. No attempt was made to bring Buist before the Court by revivor, but the plaintiffs continued their proceedings, and had a sale of the lands under the decree.

On the 15th February 1840, after the lands had been sold, and the purchaser in possession under the decree, the plaintiffs applied for an order of this Court, that they and the other reported creditors might be paid, out of the purchase-money then in bank, the amount of their demands, including their costs as decreed. The plaintiffs' taxed costs amounted altogether to nearly £1100. The Court made the order as desired. Upon the motion, Buist came in and sought to impound a sufficient portion of the sum payable to the plaintiffs to satisfy the costs decreed to be paid by them to the defendant Wise; but as it appeared that those costs were not then taxed, and that there was no question as to the solvency of the plaintiffs, Buist's application was refused, without prejudice to such further proceeding as he should be advised to take. After the foregoing allocation, the plaintiffs were not further concerned with this cause; but a residue of the purchase-money still remained, as to which a controversy arose between certain other parties, and the litigation between them was still pending at the time of the motion hereinafter mentioned.

Upon Buist's application, the Master issued a summons for the 1st June 1840, to tax the costs of the defendant Wm. Wise. The plaintiffs' solicitor attended, but apprised the Master of Wise's death, and that Buist was not before the Court, and therefore objected to the taxation. However, the Master (Townsend) decided that the costs should be taxed; but that he would not certify the taxation until after the expiration of the then Trinity Term, in order to give the plaintiffs the opportunity of raising their objection by an application to the Master of the Rolls, before a subpoena for the costs could be issued. The plaintiffs' solicitor then, under protest, attended the taxation, and had the bill considerably reduced; and after the Trinity Sittings,* (the plaintiffs having neglected to apply to the Court upon the subject), the Master certified, that on the 1st of June 1840, he had taxed the costs of the defendant W. Wise to the sum of £119. 2s. 2d. in the presence of Buist and of the plaintiffs' solicitor; and without prejudice to such application within the then

* The Master of the Rolls sat until the 9th of July.

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Trinity Term, &c. Having obtained this certificate, Baist issued and served upon the plaintiffs a subpoena for the costs.

Mr. Collins, Q. C., for the plaintiffs, now moved that the subpoena and all proceedings founded upon it might be set aside for irregularity.—He insisted that according to the established rule in equity, where one party is ordered to pay costs to another, if either dies before taxation the right to recover them is gone; *Jupp v. Geering* (a); *Averall v. Wade* (b); *Betagh v. Concanon* (c);—unless the rule is avoided by the special agreement of the parties, as in *Tucker v. Wilkins* (d); that Wise's administrator was not a party to this cause, and that his interference in it was altogether irregular.

Mr. Warren Q. C., and Mr. Jenkins, for the administrator of Wise.

The rule upon which the plaintiffs rely, applies only where by the decree there is nothing to be done but the payment of costs, so that by the death of either party, the cause is entirely out of Court, and the revivor should be for costs merely. If at the time of the abatement there is any thing in the decree remaining to be executed besides the payment of costs, the rule does not apply: *Johnson v. Peck* (e); *Kemp v. Mackrell* (f). In the present case, Wise died within three weeks after the decree was pronounced. Was there then nothing to be done under it except the payment of Wise's costs? That is not suggested. On the contrary, it appears that the plaintiffs proceeded in the cause, as if no abatement had happened, to carry the decree into effect for their own benefit; they had a sale of the lands; made title to the purchaser, for whom they had of course to enter satisfaction upon their judgments; and after the lapse of two years from Wise's death, they obtained an order from this Court for payment out of the purchase-money, of the full amount of their demands under the decree, including a sum of nearly £1100 for costs. Now, having taken all the benefit of the decree, they endeavour to evade the duty it imposed on them of paying Wise's costs; but the Court will not permit them to do so. If those costs had been decreed out of the estate, or to be paid by the plaintiffs *de bonis testatoris*, the rule would not have applied: *Blower v. Morret* (g); *Kemp v. Mackrell* (h); *Lord Dacres v. Tuite* (i); *Jenour v. Jenour* (k); and there is no good reason why Wise's administrator should be in a worse situation because the costs were decreed

(a) 5 Mad. 325.

(c) Lloyd & G. temp. Plunk. 359.

(e) 2 Ves. sen. 465.

(g) 3 Atk. 772.

(i) 2 Ch. Rep. 127.

(b) 1 Moll. 571, n.

(d) 7 Sim. 349.

(f) 2 Ves. sen. 579, and 3 Atk. 812.

(h) 3 Atk. 812.

(k) 10 Ves. 572.

against the plaintiffs personally. Again, it has been decided in several cases (although in *Jupp v. Geering* Sir J. Leach denies the distinction) that there is a difference between abatement by death of the party to receive the costs and abatement by death of the party to pay them, and that in the former case the rule does not apply: *Lowten v. The Mayor of Colchester* (a); *Hall v. Smith* (b); *Morgan v. Scudamore* (c). As to the general rule it may be observed, that, in almost every reported decision upon the subject, from the times of Lord Chancellor King to the present, it has been reprobated as hard and unreasonable. It arose before the principles of equitable jurisdiction were thoroughly understood—and, as suggested by Lord Rosslyn in *Morgan v. Scudamore*—“before the proceedings of the Court had acquired all the force they “have since:” in *Kemp v. Mackrell*, Lord Hardwicke said it was “a “hard rule and very nice distinction;” in *Betagh v. Concanon*, Lord Plunket obviously thought it unjust and irrational; and in *Averall v. Wade*, Sir William M'Mahon allowed himself to be fettered by it, but admitted that by so doing “there was a failure of justice.” The reason given for it by Sir J. Leach in *Jupp v. Geering*, may account for its origin, but cannot justify its continuance. If such reasoning should prevail, the Chancery practice both in this country and in England should be greatly altered. We might therefore, if it was necessary, confidently appeal to the Court to do now what Courts of Equity ought to have done long ago; that is, at once and altogether to repudiate a rule which is confessedly repugnant to equity and good conscience.—As to the objection that this is an abated cause, and that Wise's administrator is not a party to it, it is to be observed that notwithstanding the abatement, the cause has been and still is in full activity for the purposes of the decree; and that at any rate, the plaintiffs must be taken to have waived that ground of objection by attending upon, and taking the benefit of the taxation of the costs, whereby they had them considerably reduced.

Mr. Collins, in reply, insisted that the distinction taken in *Morgan v. Scudamore* had been expressly overruled by Sir J. Leach in *Jupp v. Geering*, and by Lord Plunket in *Betagh v. Concanon*; that *Johnson v. Perk*, and *Kemp v. Mackrell* did not apply to this case, in which the bill had been dismissed as against Wise, who had no interest whatever in the decree, except the payment of costs; that as to the plaintiffs, the cause had been long since at an end; and therefore, that the present case was clearly within the rule, and not distinguishable from *Jupp v. Geering* and *Averall v. Wade*. He further contended that the question here

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(a) 2 Mer. 115.

(b) 1 Bro. C. C. 437.

(c) 2 Ves. jun. 313, and 3 Ves. 195.

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was not whether the rule was hard or otherwise, but whether there was such a rule; and that the authorities were decisive respecting it.

MASTER OF THE ROLLS.

If upon consideration, the rule appears to me to be inconsistent with equity, nothing less than an express decision of the House of Lords shall oblige me to follow it.*

The case stood for consideration.

* Upon two or three occasions his Honor has expressed himself thus strongly: (see *Daly v. Duggan*, 1 Ir. Eq. Rep. 316); and although such language has the authority of several of the most illustrious names to be found in the history of English law, the Reporter is aware that some members of the Bar have been seriously startled by it. It is idle to suppose that declarations of the kind have any tendency to shake the *due authority of precedent* in Courts of Justice. In a very late case (*Ward v. Painter*, 2 Beav. p. 93), the Master of the Rolls in England has laid down what seems to be the general law upon the subject. After noticing the particular circumstances of the single previous decision upon the question before him, his Lordship said—"I am not, it is true, absolutely bound by a single decision of co-ordinate jurisdiction. The law of England not only allows the review of any judgment, but also the free discussion of the propriety of any legal decision; and therefore, I would put no restraint on the counsel for the defendant in the argument of this case. But a solemn decision of a competent Judge is by no means to be disregarded. I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous. My not being so satisfied is a sufficient reason for overruling this demurrer; thinking, as I do, that if *Barton v. Tattersal* is to be overruled, it should be overruled by a higher tribunal." No one can doubt the general authority of judicial decisions. They are not merely aids to subsequent adjudication; they are to the nation at large the evidences of the law, and especially, upon that account, entitled to respect, and not to be overruled without strong reason. But upon questions of law, much more than upon any other, the argument of great names is likely to have weight; and the danger is infinitely less, of precedents being hastily discredited, than that by a too rigid adherence to them, without regard to the alterations which have been and are rapidly taking place in the frame-work of society, common sense may be offended, and the genuine principles of the law neglected and forgotten. A Judge is to decide according to law; and although he is bound to have regard to the previous judicial determinations upon the same subject, it is not less his duty to bear in mind that no number of decisions however great, or however eminent and venerable may have been the Judges from whom they proceeded, can make law of that which is not law. There are a few exceptions created by public policy: for instance, on more than one occasion Lord Eldon has unhesitatingly followed decisions, although he admitted that he doubted the principles of them; because his refusing to follow them might have cast a blot upon half the titles in the kingdom. The exceptions, however, only prove the general rule; which seems to be, that precedents are to be followed, but not blindly; lest peradventure the blind lead the blind and both fall into a ditch. As to the old saying—"the worst of laws is that which is uncertain," it is to be observed, that, admitting the general truth intended to be conveyed by it, it shews no cause why error should be perpetuated; on the contrary, it furnishes the strongest reason for correcting at once what needs to be corrected: for the law must ever be "uncertain" while its principles are unsound. It is needless to refer to the often quoted passage from the *Eccelesiastical Polity* on the nature of law; as it is a first principle of British jurisprudence that *what is not good law is not law*.

The MASTER OF THE ROLLS, after fully stating the facts of this case, now delivered his judgment upon it to the following effect:—

The plaintiffs insist that the subpoena has issued irregularly, and should now be set aside: they say that where costs are decreed to be paid by a plaintiff to a defendant, or by a defendant to a plaintiff, the right to recover them is lost by the death of either party before taxation; and that the effect of the abatement is all the same, whether it be by the death of the person decreed to pay the costs, or of the person entitled to receive them. For this position, they rely upon the case of *Jupp v. Geering*, decided by Sir J. Leach, in the year 1826, and the subsequent decision of the late Master of the Rolls in *Averall v. Wade*. In the former case the Vice-Chancellor decided in analogy to the common law. I quote his words:—"At common law, costs were lost if either party died before final judgment; but by the statute of 17 Car. 2, c. 8, if either party dies between the verdict and the final judgment, the final judgment may still be entered up, and costs and damages recovered; and the 8 & 9 W. 3, c. 11, extends the remedy to cases where either party dies after interlocutory, and before final judgment. The final judgment at law ascertains the amount of the costs, and is necessarily, therefore, preceded by taxation. The statutes to which I have referred have no application to cases in equity, and proceeding, therefore, upon the general analogies of the common law, I must hold that costs in equity are lost by the death of either party before taxation, as costs at common law were lost by the death of either party before final judgment." Thus, the analogy to the common law is the sole ground of Sir J. Leach's decision, and appears to have been always regarded as the foundation of the rule that there cannot be a revivor for costs decreed but not taxed at the death of the party. Speaking of it, with reference to the decisions of former Judges, Lord Rosslyn says in *Morgan v. Scudamore* (a), "I cannot help thinking (the proceedings of the Court had not acquired all the force they have since) they were guided a little too much by a supposed analogy to the case of a judgment at law. It is quite impossible to draw any strict analogy between them." I, too, must own, I can see no reason why the large discretion of a Court of Equity should proceed in analogy to a rigid rule of common law, which long ago was found to be so much against the common sense of mankind, that acts of parliament were passed to limit the application of it even in the Common Law Courts. But assuming the Vice-Chancellor's decision in *Jupp v. Geering* to be law, it does not appear to me to apply to the present question. The facts of that case were these:—Geering had filed a bill against a sole defendant for the specific performance of an agreement, and upon the hearing it was dismissed

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(a) 3 Ves. 196.

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with costs. The defendant died before the costs were taxed; and Jupp having taken out administration brought a bill of revivor against Geering for the costs. To that bill a demurrer was allowed.—There, the bill in the original suit was dismissed generally: the decree was negative, except as to the payment of costs; and the decision amounts to no more than this, that a cause, in which, at the time of abatement, nothing remains to be done, except to pay costs decreed to a defendant who dies before taxation, shall not be revived for the mere purpose of obtaining an order for the payment of those costs. *Jupp v. Geering* has not decided that—where there is a decree for many other purposes besides the payment of costs—the representative of a deceased party may not obtain an order in the cause, that the plaintiffs, who, notwithstanding the abatement, have been vigorously enforcing the decree for their own benefit, may perform the duty it imposed upon them, and pay to him the costs which they were thereby ordered to pay to the defendant whom he represents.

However, *Averall v. Wade* (a) has been cited to shew that even in such a case as the present there cannot be an order for payment of the costs; that there is “no remedy.” It is said that case squares exactly with the present. The resemblance certainly is strong:—*Averall* filed a judgment creditor’s bill, making O’Connor, who was a prior incumbrancer, a party. As to O’Connor the bill was dismissed with costs; but there was a decree for payment of the plaintiff’s demand, and, if necessary, for a sale of the lands in the pleadings mentioned. Afterwards, O’Connor died before his costs were taxed, and the plaintiff proceeded to a sale under the decree, but refused to pay O’Connor’s administratrix the costs decreed; and the Officer of the Court having refused, under the circumstances, to issue a subpoena for the taxed costs, in the name of the administratrix, she applied to the Court for an order either that the plaintiff should pay the costs to her, or that the Officer should be at liberty to issue a subpoena for them at her suit against the plaintiff. The late Master of the Rolls refused the application. I think it would be found upon examination that there were circumstances in that case to distinguish it from the present; but, without attempting to draw any distinction between them, I feel bound to say that, in my opinion, the decision in that case is not one which ought to bind the Court. Adverting to it in *Betagh v. Concanon* (b), Lord Plunket said “I am not prepared to follow the “decision in that case;” and the late Master of the Rolls himself is reported to have said that the case was a hard one, and that there was “a failure of justice.” In my judgment, it would have been far better to have given the order which the justice of the case required, than to

(a) 1 Moll. 571, n.

(b) Lloyd & G. temp. Plunk. 360.

have yielded to what appears to be a technical and unsubstantial distinction,* whereby, confessedly, justice was defeated.

Morgan v. Scudamore was a much considered case.—[His Honor here stated the facts as in 2 *Ves. jun.* 313.]—When it first came on upon demurrer, Lord Rosslyn expressly stated that he did not mean to give any opinion upon the question, whether there might be a revivor for costs only, as it appeared by the statements and prayer of the bill that a revivor was necessary for other purposes of the decree besides the payment of costs, and this was, of course, admitted by the demurrer. The demurrer was, therefore, overruled. The defendant then answered, stating that the decree had been fully executed, and thus raising the precise question whether there could be a revivor for costs only. Whatever may have been Lord Rosslyn's impression as to costs at law, when this question was first mentioned, it is, I think, very plain that, when it became necessary for him to decide it, it was not upon any supposed analogy to legal distinctions his judgment was grounded. In *Lowten v. The Mayor of Colchester* (a), decided in the year 1817, Sir William Grant, observing upon the case of *Morgan v. Scudamore*, said, "There, the Master having settled the amount of the costs, but not having made his report previous to the abatement, Lord Rosslyn at first doubted whether he should not order the report to be entered *nunc pro tunc*; and, on the question coming a second time before him, he seems to have taken a broader ground, and to have thought taxation not absolutely necessary to entitle a party to revive." From this, and the judgment itself in *Morgan v. Scudamore* (b), it would appear that Lord Rosslyn, after a laborious investigation of the question (in the course of which he examined critically nearly all the printed cases upon the subject, and had the records of the Court searched for precedents), was not disposed to pay much attention to the supposed distinction between costs taxed and costs not taxed at the time of an abatement; and that—pro-

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(a), 2 Mer. 115.

(b) 3 Ves. 195.

(c) 3 Atk. 812, and S. C. 2 Ves. sen. 579.

* In the case of *Fitzgerald v. Arthure*, 1 Ir. Eq. Rep. 196, his Honor noticed with approbation the following passage of Lord Chancellor Brougham's judgment in *Armstrong v. Armstrong*, 3 My. and Kee. 66, which seems to be not altogether inapplicable to the present subject:—

"There were times when Courts of Justice took a delight in vain subtleties and absurd refinements; as if their duty ever was, what certainly was their frequent object, rather to shew their ingenuity than to get at the truth, and to astonish ordinary minds by coming at unexpected conclusions, founded on bare probabilities; rather than satisfy the justice of the case, by deciding as all mankind besides would decide undoubtedly." * * * "Happily, we have outlived those follies, the pride of the older times, and the remains of the dark scholastic ages. Judges are now content to see things as ordinary men do."

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ceeding, not upon any erroneous notion of legal rights, but upon the broad ground of equitable principle,—he thought that costs decreed should not be lost by the fatality of the party dying before taxation. In *Kemp v. Mackrell* (a), Lord Hardwicke said, “I always held this to be “a hard rule and very nice distinction; the right to costs is the same “before taxation as after, only the *quantum* has not been ascertained.”

It is impossible to avoid perceiving that, upon this question, the opinion of Lord Hardwicke was substantially the same as the opinion of Lord Rosslyn; that both thought a Court of Equity should not be bound by such a rule as that which is contended for in this case. Where, I would ask, is the substantial difference between abatements after taxation and before it? The obligation to pay costs, and the right to recover them, are created not by the taxation but by the decree. The taxation merely settles the amount for which there has already been a decree; and the amount is not varied by the death of the party. Equity requires that a man's estate should not be mulcted in the costs occasioned by resistance to his just rights, or by his necessary defence against unconscientious demands, or by his being dragged into a litigation, in the subject-matter of which he disclaims any interest, and to which he is a stranger. Therefore, the decree, which ascertains the merits of the case, accordingly awards the costs; and I can see no colour of equitable principle in the proposition, that those costs, which by the decree of a Court of Equity are in fact found to have been so much money unduly subtracted from the proper funds for payment of the debts or support of the family of the person to whom they are awarded, are to be lost, if he happens to die before the precise amount of them is ascertained; although it is admitted the right of his representative would be clear if he had lived, perhaps a day or two longer, so that the taxation might have been complete before his death. Nor can I see why abatement before taxation, any more than abatement after taxation, should put an end to, or alter, the liability of the party decreed to pay the costs occasioned by his inequitable proceedings. The supposed distinction holds out an inducement to the person bound to pay, to delay the ascertainment of the amount as long as he can: it is, I think, a distinction without a difference, and should not be taken to be finally established, without some more satisfactory reasons being assigned for it than are to be found in the reports.

In certain cases, Courts of Equity have held that the supposed distinction was inadmissible: for instance, where the costs were decreed to be paid out of an estate or particular fund. In *Blower v. Morret* (b), by the decree, all parties were to be paid their costs out of the estate: two of the defendants died before their costs were taxed, and the residuary

(a) 3 Atk. 812; S. C. 2 Ves. sen. 579.

(b) 1 Dick. 254.

devisee insisted that those costs were therefore irrecoverable. Lord Hardwicke there said, "There is a distinction between personal costs and costs to be paid out of an estate: costs when decreed out of an estate, are a lien thereon, which makes it a security;" he further added—"and there being nothing executory, there is no occasion to revive." He accordingly ordered that the Master should proceed to tax the costs, and that when taxed they should be paid. Other exceptions have been taken (a); and it is impossible to consider them, and the obvious anxiety with which they have been sought for, without thinking that the rule against revivor for costs must have been a bad one; that it has obliged Judges sitting in Courts of Equity, in apparently simple cases, to have recourse to questionable refinements in order to do justice; and that it would have been far better if they had at once declared they would not be bound by it, than, by acknowledging its authority, have left it to the Court in each case to discover by what possible subtlety could it be evaded.

In the present case, the plaintiffs by the order of February last, to which I have already adverted, have been paid their costs and their demands out of the funds realised by means of the decree; and they now seek, without any colour of right or justice, to evade the duty which that decree cast upon them. I am perfectly satisfied that I ought not to permit them to do so. As to the objection that there should have been a revivor in this case (b), it is to be observed that the Master has certified the taxation as having been in the presence of the plaintiff's solicitor; and that this case is not at all like those in which by the abatement, the cause was to be considered as out of Court until revived. Here, for two years after the abatement, the plaintiffs themselves treated the cause as still subsisting, and did not cease to prosecute it until February last, when they were paid under the decree the full amount of their demands; and I understand there is a residue of the fund in Court respecting which some of the parties are still litigating. Under such circumstances, I see nothing to prevent the Court from ordering the plaintiffs, who came to the Court and obtained a decree, the benefit of which they have fully realised, to perform the duty which the decree imposed upon them. In *Betagh v. Concanon* (c), the Lord Chancellor thought it was the duty of the receiver, as the Officer of the Court, to pay the costs which from time to time he had been ordered to

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(a) See *Hall v. Smith*, 1 Bro. Ch. C. 437; *Johnson v. Peck*, 2 Ves. sen. 465; & 3 Atk. 773; *Tucker v. Wilkins*, 7 Sim. 349.—In *Johnson v. Peck*, Lord Hardwicke observed that this was a very strict and hard rule, and that "the Court has always endeavoured to get out of it."

(b) See the able judgment of Pennefather B. in *Egan v. Doherty*, 2 Ir. Eq. R. 85, and the cases cited in the note.

(c) *Lloyd & G. temp. Plunk. 359.*

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pay, although the party to whom they were ordered died before they were taxed; and here, I would say, that it is the duty of the plaintiffs, taking as they have done the benefit of the decree, to perform that part of it which directed them to pay Mr. Wise's costs. I do not think that the technical rule upon which the plaintiffs rely should coerce the Court to make an order inconsistent with the justice of the case.

I think the proceedings of Mr. Wise's personal representative would have been more regular, if, instead of issuing a subpoena, he had come to the Court after the costs were taxed, for an order upon the plaintiffs to pay them; but for the reasons I have given, I refuse the present application, and but for the decision in *Averall v. Wade*, which has been referred to, I would have refused it with costs.*

[The plaintiffs have appealed to the Lord Chancellor.]

*See *Knox v. Knox*, 2 Ir. Eq. Rep. 213; and *Mitchell v. Townley*, 7 Ad. & El. 166.

COOK v. BRISCOE.

(*In the Rolls.*)

Nov. 5.

After final decree in creditors suit, a consent in the nature of an allocating report will not be made a rule of Court, unless, signed by all parties who have come in under the decree as well as by the parties in the cause; and there must be an affidavit to that effect.

MR. BLAND moved, after final decree, to make a consent a rule of Court, the object of which was, that the funds standing to the credit of the cause should be paid out in certain proportions to the persons entitled. It was signed by all the parties in the cause.

MASTER OF THE ROLLS.

This consent is in the nature of an allocating report, and I cannot make it a rule of Court without an affidavit that it has been signed by all the parties who came in under the decree and proved demands before the Master.*

* In some cases the consent must be signed by the parties themselves: see *Coleman v. Mason*, 2 Ir. Eq. R. 322; see also *Gumming v. Ryan*, *ibid.* 140; consent for appointment of receiver, *Bailie v. Bailie*, 1 Ir. Eq. R. 413; as to vacating receiver's recognizance, *Fitzgerald v. Hill*, 2 Ir. Eq. R. 398.

CORBALLIS v. THE COMPANY OF UNDERTAKERS OF
THE GRAND CANAL.

(*In the Equity Exchequer.*)

By the act of Parliament, the 53 G. 3, c. 143, it was enacted, that out of the Consolidated Fund there should and might be issued by the Lord Lieutenant, as he should think fit, from time to time, any sum or sums of money not exceeding in the whole the sum of £50,000, to the Treasurer of the Company of Undertakers of the Grand Canal; to be by him applied in liquidation of the debts of the Company, in such manner as any three of the Commissioners of the Treasury should approve. This sum of £50,000 was part of a sum of 150,000, which a committee of the House of Commons had reported that it was expedient to issue to the defendants, from time to time, to be applied by them in part payment of their debts. By the same act, it was further provided, that before any part of the £50,000, to be issued under the authority of that act in the then present year, or any sum of money to be granted on account of the 150,000 should be issued to the Company, the Company should set apart out of any funds, monies, or securities belonging to them, a sum of money equal to one-third part of such sum, as should from time to time be directed to be issued for the use of the Company; the same to be placed in the Bank of Ireland in the joint names of the Commissioners of the Treasury and the Treasurer of the Company: and that the Company should apply the money so set apart, and the money to be issued to them, in liquidation of such debts of the Company, and in such manner as the Commissioners of the Treasury or any three of them should approve.

At the time of passing this act, the defendants were a body corporate constituted under several acts of Parliament; and consisted of a number of persons holding shares in the capital stock of the Company, in various sums; and amongst others, the plaintiffs were then shareholders and members of the Company; the plaintiff R. Corballis, to the extent of £3,300 of the capital stock; and the plaintiff C. Hopes, together with his late partner, J. W. Stewart (since deceased), to the extent of £3,600 of the like stock.

In the year 1813, when the 53 G. 3, c. 143, was enacted, the Company were indebted to an amount exceeding £1,160,000: and not being able to comply with the provisions of that act, by raising one-third of the sum to be advanced by the Commissioners of the Treasury out of their

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In 1814, the Grand Canal Company created certain stock with peculiar advantages to the subscribers, the legality of which was doubtful.

In 1831, they empowered the Court of Directors to exchange for new stock, such stock of 1814 as the holders thereof were willing to bring in; upon certain terms.

The plaintiffs, one of whom was a Director, and the other a stockholder, and both subscribers to the stock of 1814, refused to accede to the terms offered by the resolutions of 1831; but having so acted, that by their conduct they might have induced other stockholders of 1814 to accept of the arrangement proposed by the resolutions of 1831, they were refused relief in respect of the stock of 1814.

Semble: that where a bill is

filed by two stockholders entitled to separate sums of stock, on behalf of themselves and all other holders of the same stock, praying relief; if it should appear that one of the plaintiffs is not entitled to relief by reason of some equitable circumstances peculiar to himself, the Court may nevertheless, in that suit, give the relief sought, and is not bound to dismiss the bill.

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then existing funds, and being prohibited by the 5th section of that act from incurring any further debts by borrowing or taking up at interest any money by loan or on debentures, without the consent of the Lord Lieutenant and the Commissioners of the Treasury; but being authorised and empowered by the acts constituting the Corporation, to increase the capital stock of the Company to an unlimited extent, the Court of Directors, on the 5th of November 1814, resolved to address a letter to Mr. Peel, then the Chief Secretary of State for Ireland, stating that they had resolved on the expediency of recommending it to the Company "to advance the sum of £33, 400, or so much thereof as should be necessary, to be set apart as their proportion of the funds applicable to the further liquidation of their debts, by a subscription for new stock: and that in order to induce the proprietors to accede thereto, the Directors had it in contemplation to propose a right of priority of dividend, not exceeding *£5 per cent. per annum*, to the subscribers for the additional stock, out of such actual clear profits as should arise in any half-year to the Company from the receipt of the tolls and duties, and other property vested in them by law; after paying or providing for all expenses of maintaining and keeping up the the said canal, and also the interests of all loans and debts contracted by the Company." It was assumed that this letter was sent to Mr. Peel; but it did not appear, save as hereinafter mentioned, whether any answer had been returned to it.

It had been proposed at a meeting of the Court of Directors held the 12th of November 1814, to raise the money by a sale of the residue of certain stock created by the Company in 1810, and which had not been subscribed to: but it appearing that the money could not be procured in that manner, the Court of Directors, at a meeting held on the 26th of November 1814, prepared a report to be submitted to the Company at large, in which they stated that Mr. Peel had declined to recommend to Government a relaxation of the terms on which the Company were to obtain the advance of the second £50,000 from the Treasury: that they had then taken into consideration three plans for raising the money; first, the sale of the residuary stock of 1810; secondly, a subscription in the ordinary way; and thirdly, a subscription with priority of dividend to the subscribers: that on the first plan, "they had applied to their brokers without effect:" that they conceived the second "might not appear to afford sufficient inducement to the proprietors:" and that therefore they resolved upon the expediency of recommending to the Company to advance the sum necessary to be set apart, as their proportion of the funds, by a subscription for new stock; and in order to induce the proprietors to accede thereto, to propose a right of priority of dividends, not exceeding *£5 per cent. per annum*, to the subscribers for the additional stock, out of such actual clear profits as should arise in any half-year to the Company, from the receipt of the tolls and duties and

other property vested in them by law, after paying or providing for all expenses of maintaining and keeping up the canal, and also the interests of all loans and debts of the Company. The report then set forth the terms of the proposed subscription, which, so far as it is material to state, were, that each member of the Company who should stand possessed of stock to the amount of £750, on a certain day therein named, should be entitled to subscribe £42 10s.; for which he should receive one share of £50 additional stock; and so in proportion for any greater or less sum than £750 stock:—that the subscription should be paid up in three calls; but it was provided that any proprietor who should advance the full sum of £40 at the period of the second call should be entitled to £50 stock for every £40 so paid:—and that the subscribers for the additional stock should receive a dividend not exceeding *£5 per cent. per annum*, to commence from the 29th of September then last, out of such actual clear profits as should arise in any half-year to the Company from the receipt of the tolls and duties and other property vested in them by law, after paying or providing for all expenses of maintaining and keeping up the canal, and also the interests of all loans and debts of the Company, in priority to any dividend to be made on the present stock of the Company; and to continue until a dividend should be made upon the general stock, to the amount of *£5 per cent. per annum*; from which time, and after all arrears (if any) of dividend upon the stock to be created by the present subscription should have been paid, then the same should be consolidated with the general stock, and be entitled to dividends rateably therewith. The report further set forth the advantages of this plan; and concluded with observing, that the Company would actually and *bona fide* gain *£6 per cent. per annum*, for every £100 then advanced; the money being to be applied, not to expenditure or works or to any speculation whatever; but to liquidate so much of the Company's debt bearing interest at *£6 per cent. per annum*: and not only so, but to entitle the Company to receive, from the bounty of Parliament, treble the amount of the sum advanced.

This report was submitted to a meeting of the Company held on the 29th of November 1814; when it was resolved that the meeting be adjourned to the 3rd of December 1814, and that six copies of the plan submitted by the Court of Directors, and of a plan submitted by a Mr. Harty should lie in the Secretary's office for inspection.

In the mean time, on the 30th of November, and the morning of the 3rd of December the Court of Directors met; and on the latter occasion prepared a report to the Company in which they stated, that having taken both plans into consideration, they continued of the same opinion as at the meeting; and that if any alteration seemed advisable, it was to extend the right of subscription for a £50 share to the holder of £500 stock, instead of £750. This report was submitted to the meeting of the Company held the same day; when the plan proposed by the Court

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of Directors was unanimously adopted, with the last mentioned alteration. The language of the resolution of the Company, whereby it was resolved that the subscribers for the new stock should be entitled to a priority of dividend, differed in some respects from that used by the Court of Directors in their report. It was,—“That the subscribers for “the new stock, now to be created, shall be entitled to a dividend of £5 “*per cent. per annum*, to commence from the 29th of September last; “and so soon as the Directors shall be enabled to declare a dividend out “of clear profits, such dividend, provided it does not exceed £5 *per cent.*, “shall be paid to such subscribers either in full or in part of such dividend “of £5 *per cent.*, out of such actual clear profits as shall arise, &c.” (as in the report of the Court of Directors, save that the words “at the rate of “£5 *per cent. per annum*, from the said 29th of September last” were introduced after the words “if any of dividend.”) It was also resolved at the same meeting, that a separate account of the new stock should be kept in the books of the Company; and that after the 21st of February 1815, the Court of Directors might issue and sell for the benefit of the Company, publicly at the Stock Exchange, or by public auction at the Grand Canal-house, so much of the new stock as should not have been subscribed for.

These resolutions having been adopted by the Company, the Court of Directors, at a meeting held on the 7th of December 1814, ordered their secretary to write a letter to Mr. Peel, informing him “that at a “meeting of the Company, held on the 3rd instant, they had agreed to “advance, by subscription for additional stock, the sum requisite to “avail themselves of the liberality of Parliament.”

During these proceedings, the plaintiff Mr. Corballis was a member of the Court of Directors, and took a part in forwarding the plan proposed by the Directors.

The bill charged, that upon the faith of those resolutions, the plaintiffs and several other proprietors subscribed for the new stock, and obtained certificates under the corporate seal for each share of £50 stock, which stated that the holder thereof was entitled to priority of dividend, according to the terms of the resolutions of the Company at the meeting of the 3rd of December 1814; and that thereby, and by means of the Parliamentary grant, debts of the Company, exceeding £200,000 in amount, were liquidated.

About £19,000 was paid to the Company for subscriptions to the new stock; the residue never was sold in the public market. But notwithstanding the assistance thus afforded them by Government, the affairs of the Company again became embarrassed; and in 1817 they were unable to pay their creditors the interest due them. A statement of their affairs was then put forward by them, and an arrangement effected with the loanholders, whereby the latter agreed to accept a

reduced rate of interest, and a sum of £37,000, then due them for interest, was converted into principal, bearing interest at £5 *per cent. per annum*; and for this sum of £37,000, scrip certificates were issued to the respective loanholders, one of whom was the plaintiff Mr. Hopes.

In 1830, the affairs of the Company began to improve, and there was a prospect of there being clear profits, applicable to the payment of dividends: but questions having arisen between the proprietors of the old stock, and of the stock of 1814, and also the scripholders of 1817, the proprietors of the old stock being anxious to participate in any dividend to be made, it became an object with those interested in the affairs of the Company to effect an arrangement between the conflicting parties. Accordingly, a requisition was presented by Mr. Pim, a holder of old stock, to the Court of Directors, held on the 31st of December 1830, which was signed by several stockholders, not being Directors, and, amongst others, by the plaintiff Charles Hopes, requesting the Court of Directors to call a special general meeting of the Corporation, for the purpose (amongst others) of declaring that interest at the rate of £5 *per cent. per annum* should thenceforward be paid to the then proprietors of the stock of 1814, who should forego any claims for arrears of dividend, or interest thereon. At this meeting, the plaintiff R. Corballis, who was then also one of the Directors, was present; and at the next meeting of the Court of Directors, held the 4th of January 1831, and at which he was also present, a plan respecting the subscription of 1814, drawn up and proposed by him, was read. It assumed that one-half of the stockholders of 1814 would come in under the plan submitted by Mr. Pim, and proposed to give to the stockholders of 1814, who should not come in under Mr. Pim's plan, £400 of new stock for every £100 of stock of 1814, with the same conditions as the original. At the next meeting of the Court of Directors, held the 12th of January 1831, the requisition was taken into consideration; and it was resolved (the plaintiff R. Corballis being present, and not dissenting), that the following answer be sent to the requisitionists:—"With regard to the object of the requisition, the Directors are extremely desirous of effecting a satisfactory arrangement of the new subscription of 1814; but in consequence of some legal difficulties which have occurred, they have deemed it necessary to take the opinion of counsel upon them." The legal difficulties were with respect to the legality of the scrip of 1817, and of the provision giving priority of dividend to the stock of 1814. A case was accordingly submitted by the Court of Directors to the Attorney-General,* whose opinion tended strongly to confirm the doubts entertained with respect to the validity of those transactions. On the 24th of May 1831, the

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Court of Directors (Mr. Corballis being present) agreed to a report to be presented to the Company at their half-yearly meeting. It contained the following passages:—"Having received a requisition signed by several "respectable stockholders, suggesting the expediency of making a dividend, on certain terms, on the stock of 1814, for which a sum of "about £19,000, late currency, was subscribed, we deemed it our duty "to submit a case to the Attorney-General, whose opinion is unfavorable to making any dividend upon it, while the scrip is outstanding. "Instead of this, it has been particularly suggested to us, that an offer to "exchange four of the present stock debentures for every £100 of scrip "certificates would be accepted; by which means any arrear of interest "that might be claimed on those respective securities, would be got rid of. "And we have only to add, that we are solicitous to promote any "suitable plan for effecting a satisfactory arrangement of your scrip and "new subscription." This report was read at a meeting of the Company held the 25th of May 1831, at which the plaintiff R. Corballis was present. The requisition was again taken into consideration at a meeting of the Court of Directors held the 1st of June 1831, at which the plaintiff R. Corballis was present, when it was ordered that the following advertisement be published in the public newspapers—"Grand "Canal.—Pursuant to a requisition of a number of Proprietors of Grand "Canal Stock, the Grand Canal Company are hereby required to meet "at twelve o'clock at noon, on Saturday, the 11th of June, 1831, at the "Company's House, to take into consideration the propriety of empowering the Court of Directors to issue stock in exchange for the "New Grand Canal stock of 1814, and also for the scrip of 1817, on such "terms as may be agreed to." On the morning of the 11th of June 1831, a meeting of the Court of Directors was held, at which the report to be presented to the meeting of the Company was agreed to. Mr. Corballis was present, and protested against his being bound by the arrangement proposed, and declared that he would not accede to it. At the meeting of the Company, held the same day, Mr. Hopes being present, but not Mr. Corballis, the report of the Court of Directors was read. It stated, that in pursuance of the requisition presented at the last half-yearly meeting of the Company, requesting a special general meeting of the Company to be called, to take into consideration the propriety of empowering the Court of Directors to issue stock in exchange for the new stock of 1814, and also for the scrip of 1817, on the terms of issuing £400 of stock in exchange for £100 of new stock; and £300 of stock in exchange for £100 of scrip of 1817, the Court of Directors had felt it their duty to summon the present meeting of the Company; and it then proceeded in these words:—"We have no doubt that it is "the wish of the proprietors at large to effect an equitable arrangement "for the final settlement of all claims arising from those securities; and "we shall be solicitous to promote, to the utmost of our power, any

"plan for so desirable a purpose, which shall meet the approbation of the Company." The report having been read, it was resolved by the Company, that the Court of Directors should be empowered to issue stock for the new stock of 1814 and the scrip of 1817, on the terms mentioned in the report. The bill charged, but it was not proved, that this resolution was preceded by much discussion, during which the dissent of the plaintiff R. Corballis from the measure was alluded to; but it did not appear that he, or any person on his behalf, stated to the Company, at that meeting, that he would not accede to the proposed arrangement. A great number of the stockholders of 1814 acceded to the arrangement proposed by these resolutions; and at a meeting of the Company, held the 30th of November 1833, it was resolved, that the Court of Directors be authorised to purchase any outstanding stock of 1814 that might offer, at a price not exceeding £100 British for each £100 late currency of said stock; and that they be also authorised to purchase any outstanding scrip of 1817 that might offer, at a price not exceeding £75 British for each £100 late currency of said scrip. The plaintiff Hopes had so far availed himself of the resolutions of June 1831, that after the original bill but before the amended bill in this suit was filed, he exchanged his scrip certificates for stock; and it appeared that at the time when the amended bill in this cause was filed, £2400 only of the stock of 1814, exclusive of what was vested in the plaintiffs, was outstanding.

The bill, which was filed on behalf of the plaintiffs and the other stockholders of 1814, charged, that in 1836, there were clear profits to the amount of about £18,000 applicable to the payment of dividends; that no interest or dividends had ever been paid on the stock of 1814, from its creation to the present period; and prayed that it might be declared that the plaintiffs and the other subscribers to the increased capital stock of the Company, under the resolutions of December 1814, were entitled to a specific performance of the terms contained in those resolutions; and were therefore entitled to the payment of the arrears, which had accrued, of the dividend of *£5 per cent. per annum* therein mentioned, from the 29th of September 1814; and to the continued payment of a dividend out of the clear actual profits of the defendants as aforesaid, at *£5 per cent. per annum* on the capital stock then subscribed for, in priority to any dividend to the then holders of the original stock of the Company, until the Company should be enabled to declare a dividend at the rate of *£5 per cent. per annum* on the whole capital stock of the Company, out of the clear profits of the preceding half-year; and that from thenceforward the plaintiffs and the other subscribers under said resolutions might be decreed to stand in equal right with the holders of the original capital stock of the Company, in respect of the future profits of the Company; and for an account and payment of the sums due to plaintiffs on foot of said dividends.

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the defendants.

For the plaintiffs.—The money raised in 1814 was not a loan ; it never was to be repaid ; even the payment of dividends upon it was contingent : it was raised by the creation of new stock, and therefore, was not a violation of the 53 G. 3, c. 143. It is said, however, that the stock of 1814 is illegal, because it is provided that dividends shall be paid on it in priority to dividends on the old stock of the Company ; but it is competent for partners to agree amongst themselves, that one of them shall receive a certain proportion of the profits before the others shall receive any thing ; *Gilpin v. Enderbey (a)*. The 30th and 35th sections of the 11 & 12 G. 3, c. 31,* are then relied on, as shewing that the priority of dividend given to the stock of 1814, renders it illegal. Those provisions were introduced for the benefit of the stockholders ; and it was competent for them to renounce the advantage to be derived from them. By borrowing money, the Company might have postponed the payment of dividends on the stock of the Company, to the payment of the interest on the money borrowed ; so they might create stock with a priority of dividend. In 1814, it was found impossible to raise money by the sale of stock in the ordinary way ; it was necessary to offer some extraordinary advantage to the public, to induce them to subscribe for stock ; and it does not now lie in the mouth of the Company to say, that what they then undertook to do was illegal. The stockholders of 1814 are in the nature of annuitants ;

(a) 5 B. & A. 954.

* By the 11 & 12 G. 3, c. 31, s. 30, it is enacted, " That the proprietors of the said joint stock, their executors, administrators, and assigns, shall be entitled to the tolls, duties, and advantages and profits hereby vested in the said Company, in proportion to their respective interests in the joint stock of the said Company, subject to such charges as the said Company shall think fit to make for the completing and preserving the said works, and to the soil and water of the canals, together with the banks thereof, and such other portions of ground as the

" said Company are empowered to acquire by virtue of this act."— And section 35 enacts, " That the clear profits which shall arise to the said Company from the several duties hereby vested in them, or otherwise, or so much thereof as shall be thought proper, shall from time to time, at Lady day and Michaelmas, or within fifteen days after the said feasts respectively, be paid to and amongst the respective proprietors of the said joint stock, in proportion to their shares and interest therein."

they are *quasi* creditors, entitled to payment of their demands in priority to the dividends on the old stock; nor is the transaction, viewed in this light, contrary to the provisions of the 53 G. 3, c. 143; for the money was not raised by way of loan, but by sale of annuities. Supposing, then, that the stock of 1814 is not illegal, the plaintiffs are not barred of relief by the part they took in the transactions of 1831. It is said that Mr. Corballis was the author of the plan upon which the resolutions of 1831 were founded; and that having induced the Company and the stockholders to adopt those resolutions, he now seeks to avoid being bound by them himself. It is a mistake to say that the Company adopted the plan suggested by Mr. Corballis. He proposed to give priority of dividend to those who should exchange their stock of 1814 for new stock. That provision is altogether omitted in the resolutions of June 1831. His plan was a mere *projet*, which was not adopted. And although, as a Director, he may have considered the plan adopted by the Company as beneficial to their interests in general, yet he always declared, that for his own part, he would not accede to it; but would insist on his priority under the terms of the subscription of 1814: and this he was authorised to do; for the resolutions of 1831 were not compulsory on the stockholders, but only bound those who chose to adopt them. As to Mr. Hopes, his case is free from objection on this head. He was not a Director; and the only act done by him, which it can be pretended has deprived him of his rights as a stockholder of 1814, is his having exchanged his scrip of 1817 for the new stock, under the provisions of the resolutions of June 1831. But those resolutions are several in their nature; and his having adopted them with reference to the scrip of 1817, does not bind him to adopt them with regard to the stock of 1814. The scrip was clearly illegal; the stock, not. *Roche v. O'Brien* (a); *Price v. Dyer* (b); and *Robinson v. Page* (c), were referred to.

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For the defendants.—This is not a case of co-partners, at common law; but of a Company created by statute for particular purposes, and bound to regulate their proceedings by the act of Parliament incorporating them. The defendants rely upon three grounds of defence: first, that the contract of 1814 is illegal, so far as it purports to give to the subscribers for stock under it, a priority of dividend over the other stockholders. Second, that supposing the Company had power to create stock, with priority of dividend, it was not competent for them to limit the subscription to persons who held £500 old stock. Third, that the conduct of the plaintiffs, in respect of the transaction of 1831, has disentitled them to call on the Court for relief.

1st. The 11 & 12 G. 3, c. 31, vested, as a gift from the public, pro-

(a) 1 Ball & B. 338.

(b) 17 Ves. 356.

(c) 3 Russ. 114.

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perty of very considerable value in this Company, to be used by them for the benefit of the public at large. The Corporation are not a mere trading company, but a public body, entrusted with public property, to be managed for the benefit of the public as well as of themselves, pursuant to the provisions of the act incorporating them. The stock of the Company is also saleable in the public market. The policy of the act is therefore to be more strictly observed, than if the defendants were merely a private trading body. The 11th, 30th, and 35th sections of the act point out the object of the legislature,—that the first subscribers to stock should have advantages over those who should afterwards become purchasers of new stock; and that the clear profits should be divided amongst all the stockholders, in proportion to the amount of stock they respectively held. This provision is clearly violated, by giving priority to one class of stockholders over another.—[PENNEFATHER, B. Suppose the 53 G. 3, c. 143, had not been passed, might not the Company have raised money by way of annuity, instead of loan? By the former acts, the Corporation had a power of borrowing money to an unlimited extent; if they exercised that power, they thereby postponed the payment of dividends to the stockholders, until the interest on the loan had been satisfied. If they could thus indirectly postpone the payment of dividends, what is there to prevent their doing so directly, by the creation of stock with priority of dividend? It is but a mode of raising money, viz.:—by the grant of an annuity at the rate of *£5 per cent. per annum* upon the sum advanced: and whether that annuity be granted to strangers, or to members of the Company, cannot make any difference in principle. Then, the 53 G. 3, c. 143, did not absolutely prohibit the Company from raising money, but only required that they should have the consent of the Lord Lieutenant to their doing so. Now, although there was no formal assent given by him to this mode of raising the money; yet the proposed plan was communicated to the Government, and the money was afterwards advanced from the Treasury.]—The transaction of 1814 neither was, nor purported to be the grant of an annuity; but the creation of new stock with peculiar privileges; and supposing it to be like the grant of an annuity, it is a mode of raising money within the spirit and intention of the 53 G. 3, c. 143, and illegal, for the precise plan was not communicated to Mr. Peel. He was not informed of the restrictions imposed upon the number of persons who were to be permitted to subscribe.

2nd. The confining the subscription to proprietors of £500 stock was inequitable; and, therefore, this Court will not lend its aid to enforce the contract. The plaintiffs stood in the situation of trustees for the general body of the proprietors, and had no right to be parties to a transaction reserving a peculiar benefit to themselves. It is evident

that in 1814, it was supposed that subscription to the new stock would be a profitable mode of investing money. If it were not so considered, why should the right of subscribing to the new stock be confined to proprietors of £500 stock? It was for the advantage of the Company at large, that the money should be raised at the cheapest rate possible; and, therefore, that the market for the sale of the new stock should be as extended as possible. Yet the Directors at first sought to confine the right of subscription to proprietors of £750 stock, the sum which would qualify any proprietor to be elected a Director; and although that limit was afterwards extended to proprietors of £500 stock, it is to be observed, that the latter sum was necessary to qualify a proprietor to complain of the proceedings of the Court of Directors.* Such limitation of the right to subscribe was injurious to the interests of the Company at large; and the Directors (among whom was Mr. Corballis), and the proprietors of £250 stock (who alone had a right to vote at the general meeting of the Company, and among whom was Mr. Hopes) were guilty of a breach of trust in so limiting it. They were in the nature of trustees for the holders of stock to a less amount than £250, and as such cannot deal with the trust fund in such a manner as to benefit themselves. *Ex parte James (a)*; *Piety v. Stace (b)*.

3rd. The conduct of the plaintiffs in respect to the transaction of 1831 has disentitled them to the relief they pray by this bill. Mr. Corballis was a member of the Court of Directors, and joined with them in stating their desire to concur in any measure having for its object the settlement of the claims of the stockholders of 1814. He had himself submitted to the Court of Directors a project for the abolition of those claims, which was the foundation of the arrangement afterwards entered into: and although he may, in the Court of Directors, have expressed his dissent from the precise plan which was afterwards submitted to and approved of by the Company at their meeting, yet he absented himself from that meeting, and did not, as it was his duty to have done, there openly and explicitly express his disapprobation of the propositions submitted to the meeting, and declare that he would not accept of the terms offered thereby. By his conduct, in being a party to the proceedings of the Court of Directors, and in not protesting against the resolutions at the meeting of the Company in June 1831, he may have induced other holders of the stock of 1814 to come in under the arrangement then proposed, they supposing that he also would accede to the terms offered. It is like the case of a debtor compounding with his creditors: one of them, who has by his conduct induced others to accept the composition, will himself be bound to come in rateably with the

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(a) 8 Ves. 337, 348.

(b) 4 Ves. 620, 622.

* 29 G. 3, c. 39, s. 23.

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other creditors. As to Mr. Hopes, he subscribed the requisition presented by Mr. Pim, which had for its object the payment of dividends to the holders of old stock, and which was the first step taken towards effecting the arrangement of 1831; and he attended the meeting of June 1831, and did not dissent from the resolutions then passed. The same observations apply to him as to Mr. Corballis; his conduct was such as might induce other proprietors of new stock to believe that the resolutions had his full concurrence, and that he would accept of the arrangement thereby offered. And it is to be observed, that he actually did accede to that arrangement in one part of it; for he has exchanged his scrip receipts for money, pursuant to it. He cannot agree to the resolutions in part, and disagree in part; for they all form but one plan for settling the conflicting claims of the stockholders.

[The COURT directed the case to be further argued; especially with respect to the question, whether, supposing that they should be of opinion that a valid defence had been established as against the claim of Mr. Corballis, but not as against that of Mr. Hopes, any decree could be made in this suit in favor of the latter? The arguments upon the general questions are incorporated in the foregoing part of the report. Upon the latter question,]

Mr. *F. Gould*, for the defendants.—If the bill be dismissed so far as it relates to the claim of Mr. Corballis, his interest will then become identified with that of the proprietors of the old stock, and opposed to that of Mr. Hopes. The case will then stand in the position of a bill filed by two persons, one of whom has not only no interest in the demand of the other, but who is interested in opposing it. In such a state of the pleadings, no relief can be given; *Jones v. Garcia del Rio* (a); *Wentworth v. Turner* (b); *Bill v. Cureton* (c); *Glynn v. Soares* (d); *Sigel v. Phelps* (e); *Hunter v. Richardson* (f); *Makepeace v. Haythorne* (g); *King of Spain v. Machado* (h); *Cuff v. Platell* (i); *Delondre v. Shaw* (k).

PENNEFATHER, B.—Here Mr. Corballis had an equity which he waived:—it is different from a case where one of the parties never had an equity.

Mr. *Holmes* for the plaintiffs.—The bill is filed on behalf of all the

(a) Tur. & R. 297.

(c) 2 My. & K. 503, 512.

(e) 7 Sim. 239.

(g) 4 Russ. 244.

(i) 4 Russ. 242.

(b) 3 Ves. 3.

(d) 3 My. & K. 450, 470.

(f) 6 Madd. 89.

(h) 4 Russ. 225, 560.

(k) 2 Sim. 237.

stockholders of 1814; either of the plaintiffs is, by himself, capable of sustaining the suit. It is like a bill filed by two creditors on behalf of themselves and all other creditors of the deceased debtor for an administration of his assets. In such a case, there is not an authority to be found, to the effect that the bill must be wholly dismissed, if one of the plaintiffs fail to substantiate his demand.

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PENNEFATHER, B.

On the question of pleading, the Court is with the plaintiffs. But with respect to the principal matters, the case stands thus:—In the year 1772, an act of Parliament, the 11 & 12 G. 3, c. 31, was passed; by which this Company were incorporated. The attention of the Court has, during the argument, been drawn to certain sections of that statute; and the question, what is the true construction to be given to those sections, has been much debated: but it may perhaps be unnecessary for the Court to give any precise opinion upon that question, although they cannot exclude the consideration of the subject altogether. Under the provisions of that act of Parliament, the Company conducted their affairs for several years, until the year 1813, when they appear to have become involved in considerable embarrassments. Their capital stock, at that time, amounted to about £560,000; and their debts exceeded £1,10,000. To relieve them from their difficulties, an act of Parliament, the 53 G. 3, c. 143, was passed, authorising an advance of money out of the Consolidated Fund to the Company: but that advance was only to be made upon the Company complying with certain conditions; for the Legislature considered it right that relief should be given to them only upon the terms of their coming forward and doing something of themselves towards the reduction of their debt. In 1814 a sum of £50,000 was in the hands of the Government, for the purpose of being issued to the Company upon their complying with the terms imposed upon them by the act; and it was expected that a further sum of £50,000 would be advanced to them in the ensuing session of Parliament, upon the same terms. It was, therefore, a matter of importance to the Company, to procure the money, which, by the act, they were obliged to lodge in the Bank of Ireland before the £50,000 could be advanced to them. It appears that, in the first instance, they applied to the Government to advance the £50,000 without a corresponding advance being made by themselves; but that Mr. Peel, then the Secretary of State for Ireland, expressed to them his determination that the £50,000 should not be issued unless the Company complied with the terms of the act. Efforts were then made by the Company to raise the required sum of money. They were not able to procure it by sale of stock in the ordinary way; and by the 53 G. 3, c. 143, s. 5, they were expressly prohibited raising

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money by way of loan or borrowing, unless with the sanction of the Lord Lieutenant, which was not given. In this emergency they sought the advice of some of the most ingenious and learned counsel of the day, as to how this difficulty was to be got over; and a plan was suggested, which was afterwards adopted, and which it would appear, was considered as being something between raising money by a sale of stock in the ordinary way, and raising it by way of loan. The plan was this:—they resolved that an additional quantity of stock should be sold; and as an inducement to persons to become purchasers of it, they resolved that dividends upon it, at the rate of *£5 per cent. per annum*, should be paid to the subscribers in preference and priority to any dividends upon the old stock; and should so continue payable until the affairs of the Company were in such a situation as would enable them to declare a dividend out of the clear profits, of *£5 per cent. per annum*, upon the general stock of the Company; from which period the holders of the new stock were to be placed upon the same footing as the proprietors of the original stock, and were to enjoy the benefit of any further advantages to which the affairs of the Company might entitle them. A communication was made to the Government, not of the precise mode which the parties interested had adopted for carrying this plan into execution; but generally, that the money was to be raised by a sale of stock, with priority of dividends; and that it would be lodged in the Bank before the 16th of January 1814. But whether any benefit was to be given to any particular class of stockholders, was not communicated to them. For it was resolved, and Mr. Corballis was an assenting party to the resolution, that the mode in which this money was to be raised, was not to be by sending their new stock into the market, where all the shareholders of the Company would be at liberty to purchase it with the advantages it possessed, whatever they might be; but it was determined, that a right of pre-emption should be given to the holders of £500 of stock. The original proposition was that the subscription should be confined to holders of £750 of the old stock;—the precise sum which qualified a member of the Company to be a Director; but it was subsequently extended to proprietors of £500 stock. That restriction of the right of obtaining the benefit which it was expected would accrue to the subscribers to the new stock, was not communicated to the Government; so that it cannot be said that this mode of carrying their plan into execution had, in any manner, their approbation. As to the nature of the transaction itself, certainly, if it were not a loan (and I do not think it was), it was something very closely bordering upon and resembling it. It was not the creation of original stock; it was like the sale of an annuity, which ousted the general stockholders of their privileges and affected their rights, but was *pursue* to the demands of the then existing creditors of the Company. It has been very

strongly urged, that this mode of raising the money was objectionable; that it was in opposition to the fundamental laws of the Company, for that by the 11 & 12 G. 3, c. 31, ss. 30 & 35, it was enacted, that the clear profits should be divided amongst the proprietors of the stock, rateably in proportion to their shares therein; and certainly a division of profit which would give to some of the stockholders a priority of dividend, would be a clear contravention to those express enactments of the Legislature. But it was said in reply, that this was a *bona fide* transaction;—that it was entered into for the purpose of saving the Company from utter ruin;—that if the money had not been raised, the advance could not have been obtained from the Treasury; that it was, therefore, a matter advantageous to all the shareholders; and that it was sanctioned by them, for it was sanctioned by those who, according to the original constitution of the Company, and the enactment of the Legislature, represented the entire body of the shareholders. And it was argued with great force, that any shareholder might renounce a benefit given to himself; and as he might do so in his individual capacity, so it might be renounced on his behalf by a person legally representing him. On the other hand it was said, that the right to bind the general body of shareholders, given by the act to proprietors of £250 stock, ought not to be construed to give them the power of affecting the rights of the general body of shareholders, which were provided for them by the same act of Parliament: and that such a construction might be pushed to this extent, that the proprietors of £250 stock might bind the Company by a resolution that they themselves should be paid dividends, while the holders of the lesser sums of stock should not be paid any thing. If it were contended that such a power existed, every person would exclaim that it was most unjust; but I confess that if I were now bound to express an opinion as to the legality of the stock of 1814, I should feel very great difficulty in coming to a conclusion satisfactory to myself. I think, however, that under the circumstances of this case, I am not called upon to decide that question. It is sufficient in the view which it appears to me ought to be taken of this case, to say, that it is a very grave question of difficulty and doubt. For how was this plan carried into execution by the Directors and Mr. Corballis? for in this part of the case Mr. Hopes does not appear to have acted at all. They gave a bonus, or what might be a bonus, to their own body, and not to the general proprietors of the stock. The case is not altered in the view of a Court of Equity, by the consideration that this transaction did not turn out to be an advantageous mode of investing money; it is sufficient to bring the case within the principles upon which the Court acts, that it might have been a benefit, and that it bore the appearance, at least, of conferring a benefit upon those who were bound by their situation to have consulted the interests of the whole body of

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proprietors. In my opinion, therefore, so far as the Directors are concerned, this mode of raising the money was very objectionable. I do not mean to say that there is any reflection, morally speaking, on the character of those engaged in this transaction. They probably considered that it was the best mode of effecting that which was the object of all. They may not even have contemplated much benefit to themselves from the plan; and in fact it does appear that Mr. Corballis did not take more than two shares of £50 by virtue of this right of pre-emption: so that it seems, that however glittering this plan may have appeared to those who were not well acquainted with the affairs of the Company, it was not, in reality, so advantageous as it purported to be. Mr. Corballis did not embark deeply in it: but he did embark in it: it did profess to give a benefit to the subscribers, and to be exclusive; and if held out as a lure to the public, as has been suggested, it was not such as a Director of the Company ought to have taken advantage of. So that the case, upon this part of it, stands thus: it was doubtful whether the plan of raising the money by the sale of stock with priority of dividend, even supposing it to have been carried into execution in the most unobjectionable manner, was sanctioned by the original act of Parliament constituting this Corporation; but the mode actually adopted for carrying that plan into execution was most objectionable, when considered with reference to the conduct of the Directors of the Company. With this part of the case, Mr. Hopes is not connected; he was not a Director; he was a holder both of old and new stock; and was also a creditor of the Company. With respect to the loanholders of the Company, a transaction took place in 1817, which it is material to consider. Shortly after the year 1814, the Company became unable to pay the interest due to the loanholders; and in 1817 they were in arrear to their creditors to the amount of one year's interest. Finding it impossible to raise money to pay off the interest, they came to an arrangement with their creditors; and resorted to an expedient which was, I think, in direct violation of the 53 G. 3, c. 143, s. 5. They converted the arrear of interest into a new debt bearing interest; and for this new debt, scrip receipts were issued. Mr. Hopes, who was at the time a creditor of the Company, acceded to this arrangement, and became the possessor of certain scrip receipts. About 1830, the affairs of the Company began to improve; and the holders of the old stock were anxious that a dividend should be made on the entire stock of the Company. The difficulties in the way of making such a dividend arose principally from the arrear of dividend due to the stockholders of 1814, and the scrip-holders of 1817. In January 1831, Mr. Pim brought forward a proposition, acceded to by fifty-nine other holders of old stock, among whom was Mr. Hopes. It was that the holders of stock of 1814, one of whom Mr. Hopes then was, should give up all the arrears of divi-

dend then due to them from 1814 to 1831, and receive in future dividends at the rate of £5 *per cent.* in priority to the old stockholders. Mr. Hopes cannot now say that that proposition had not met his full concurrence. This proposition was submitted to the Directors; they having taken it into their consideration (Mr. Corballis being one of them), professed the greatest anxiety to promote to the utmost of their power any plan for so desirable an object; viz., the payment of dividends to the old stockholders. But how was that object to be accomplished? By getting rid of the prior claims of the stockholders of 1814, and the scripholders of 1817. Mr. Corballis, therefore, held himself forth to the world as a Director, who was anxious to come into any fair arrangement for that purpose. But what was the situation of Mr. Corballis and Mr. Hopes at that time? They were each of them holders to a large amount of old stock; they had, therefore, apparently, a strong interest to forward in substance the proposition of Mr. Pim; by which they would be enabled to receive a dividend on account of their original stock. They were also holders of the stock of 1814, and Mr. Hopes was a holder of scrip of 1817; but they represented themselves as preferring their interest as holders of old stock to their interest as holders of the new stock.

Mr. Corballis had himself made a proposal for the relinquishment of his right as a stockholder of 1814, but upon terms which were not acceded to; and which, if examined into, would appear to be very disadvantageous to the Company, though beneficial to himself. On the 11th of June 1831, a meeting of the proprietary at large was held; at which certain resolutions were finally entered into, in consequence of the original proposition made by Mr. Pim. Previous to that meeting, the Court of Directors had assembled; but the Court has not been informed of the particulars of what took place there. The resolutions adopted by the proprietary at large were:—That with respect to the stock of 1814 and the scrip of 1817, they should be entirely abolished, by giving to each holder of that stock of 1814, £400 *per cent.* of original stock for his stock of 1814; and to each holder of scrip, £300 *per cent.* of original stock for his scrip of 1817. The resolutions of 1831 are, properly, couched in terms giving an option to the holders of the stock of 1814, and scrip of 1817, to come in or not, as they pleased; but do not affect to make it compulsory on them to exchange their new stock or scrip for old stock; nevertheless, it cannot be said that those resolutions were not made in pursuance of, and following up the proposition of Mr. Pim; and is it not to be presumed that Mr. Hopes, who had expressly sanctioned the original plan of Mr. Pim, and who attended that meeting of June 1831, and did not dissent from the resolutions then passed, assented to them? It has been argued, that he only assented to an option being given to him to accede to the terms offered: but when it

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is considered, that by these resolutions, the object which he desired was facilitated, namely, the payment of dividends upon the old stock of which he was a large holder, is it not to be presumed that he not merely assented to the resolutions in the terms in which they were passed, but that he also agreed to come in under them? Is it to be said, that the man who was active in forwarding this plan—who was the originator of it—who attended the meeting at which these resolutions, arising out of and following up his plan, were adopted, and did not dissent from them—that he did not fully acquiesce in the propriety of them? But it is said that Mr. Corballis was not present at that meeting; and that at the Court of Directors which had been held previous to the meeting of the Company, he had dissented from these resolutions, and declared that he would not come in under them. If that be the case, then I would say that, circumstanced as Mr. Corballis was—a Director who had concurred in a report of the Court of which he was a member, expressive of their anxiety to forward and carry into execution any plan for the purpose of effecting an arrangement with the stockholders of 1814—that it was his duty, publicly, at that meeting, to have expressed his dissent from the mode of carrying the proposed object into execution; and to have informed the proprietary at large, that whatever others might do, he would not act upon the proposed resolutions, nor be a person to induce others to accede to them, by a seeming acquiescence in them. I hold it to be very clear, that a person in the situation of Mr. Corballis was bound in fair dealing—by his duty as a Director—by the share he had theretofore taken in the transaction—and by the advantages he would derive if all but himself had come in under those resolutions—to have expressed, fully and clearly, his dissent from those resolutions, and his determination not to accede to them; so that others might not be misled by his conduct. As to Mr. Hopes, he not only acquiesced in the resolutions of 1831, but in part acted upon them, and took a benefit under them; for he gave up his scrip certificates, and accepted, in lieu of them, the money, which, by a subsequent resolution of the Company, based upon the resolutions of 1831, the Directors were empowered to give for them, instead of the £300 *per cent.* of old stock. I am aware that the dissent of Mr. Corballis was alluded to at the meeting of the Company in June 1831; but the statement that he did dissent was not authorised by him: he did not adopt any measures for putting his dissent upon record, by moving a counter resolution, or by writing a letter to the Chairman; but merely absented himself from the meeting, after having expressed his anxiety to forward any plan for effecting the proposed object. That was not a fulfilment of that duty and obligation which his situation of Director imposed on him. Placed in the circumstances in which he stood, there was a plain and manifest duty cast upon him, of intimating to the proprietors of the stock of 1814 that he—a member of the Court

of Directors—a holder of old stock—a person who had expressed his anxiety to forward any plan, having for its object the payment of dividends to the holders of that stock, would not accede to the proposed resolutions.

Both the plaintiffs were holders of old stock, and therefore had, apparently, an interest in promoting the proposition for payment of dividends upon it. They were also holders of new stock, which gave them an interest in dissenting from the resolutions. But Mr. Corballis, being a Director, was, under the circumstances, bound to express his dissent; and Mr. Hopes must be taken to have given his full concurrence and acquiescence to the propositions submitted to the Company. Nor is it to be forgotten that in 1831 the legality of the original transactions of 1814 and of 1817 was questioned; and under such circumstances, it was not unnatural for the proprietary at large to suppose that the plaintiffs would have given a ready acquiescence to a proposal, which in reality was not very disadvantageous to them, nor unworthy of the Company. However it now appears, that after almost every other holder of the stock of 1814 has acquiesced in the arrangement of 1831 (whether induced thereto by the conduct of the plaintiffs or not, we cannot say; it is sufficient that it may have been so), the plaintiffs insist that they are now entitled to a specific execution of the contract of 1814, and to be paid dividends upon this stock at the rate of £5 *per cent. per annum*, from that period to the present time, in preference and priority to any dividends on the old stock. It would, however, appear to me that the assistance of this Court ought not to be given, to carry into execution a contract the legality of which appears to be extremely doubtful; although I do not rest my judgment upon that principle: for in my opinion, and I believe the other members of the Court concur in this view of the case, the plaintiffs have, by the conduct they have pursued, disentitled themselves to call upon the Court for a specific execution of the contract of 1814. Therefore, the defendants offering to give to the plaintiffs the benefit of the resolutions of June 1831, and to abide by the same, and to put the plaintiffs on an equality with the other stockholders who came in under those resolutions, let the bill be dismissed, but without costs.

FOSTER B., concurred.

RICHARDS B.

I am of opinion that the transaction of 1814 is against the letter and the spirit of the 11 & 12 G. 3, c. 31: the thirtieth and thirty-fifth sections of which contain a distinct and positive enactment that the clear profits which shall arise to the Company from the tolls, &c., vested in them shall be paid to and amongst the proprietors of the stock, in proportion to their shares and interests therein. That clearly excludes the

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idea of any priority of one stockholder over another. There are other sections of the act relating to the power of making by-laws, which we have been referred to; but they cannot authorise the Company, to make a by-law contrary to the statutes of the realm. Could the Company the day after the act received the Royal assent, pass a by-law rescinding the 30th and 35th sections of it; and shall it be said that they can do by a mere resolution, what they have not power to do by a by-law? If the money raised in 1814 be considered in the nature of a charge upon the funds of the Company in priority to the rights of the general shareholders; then, in my opinion, that transaction, if not within the strict letter of the 52 G. 3, c. 143, is certainly contrary to the principle and spirit of that statute. For these reasons, even if there were nothing more in the case, I would feel great difficulty in giving effect to the contract of 1814. I cannot accede to the argument which has been advanced on behalf of the plaintiffs, that it was competent for the proprietors of £250 stock, who alone had a right to vote at the proceedings of the Company, to waive a fundamental principle upon which the Corporation was established, and which was guaranteed to all the shareholders by the act of Parliament. The shareholders could not waive the act of Parliament, even if all of them were entitled to vote; they were endowed with large and valuable property by the public at large, and were in a manner trustees for them: much less could a certain number of the shareholders waive the provisions of the statute.

Then as to the particular circumstances of this case. Mr. Corballis was one of the Directors of the Company; a statuteable trustee, as I may call him, appointed for the purpose of carrying into execution the provisions of the act and the purposes for which the Company was established. It is plain that the transaction of 1814 was one by which it was intended that a benefit should be conferred upon a certain class of proprietors, both the plaintiffs being of that number, to the exclusion of the greater portion of the proprietary, who had no votes at the meeting of the Company: whose rights the Directors and those who were entitled to vote, were in an especial manner bound to protect. It is idle now to say that the speculation did not turn out to be advantageous: that is not what the Court has to consider. It was conceived at the time that it would be advantageous; and that is sufficient to found the defence. But when we are called upon to say that this has not been an advantageous speculation, ought we not to look at the acts of the plaintiffs themselves? and if we do, we find that in 1831 Mr. Corballis considered this so good a bargain, that he proposed an arrangement by which he would receive four shares of £100 old stock for every £73. 16s. 3d. subscribed by him in 1814; and further, that he should thenceforth receive an annual sum of £10 for every such sum of £73. 16s. 3d., and be paid the dividends on the £400 old stock in pri-

ority to the dividends on the original stock. If that had been acceded to, the speculation would have been a most advantageous one. If Mr. Corballis imagined that the stock of 1814 was of that value in 1831, it was a most inequitable thing in him, to be accessory as a Director to the carrying into effect the arrangement of 1831; and by his conduct inducing other shareholders to accept of such disadvantageous terms.

Again, Mr. Corballis, standing in the double character of *quasi* trustee and shareholder of the stock of 1814, ought to have adopted some clear and unequivocal mode of signifying his dissent from the arrangement of 1831. As a matter of candour and fair dealing, it was due to the Company in general that he should so have signified his dissent; it was also due to the holders of the stock of 1814, who might be misled by his conduct. In my opinion, Mr. Corballis, filling the double character of trustee and shareholder, ought to have so acted as to have freed this part of the case from all obscurity. He grumbled at the arrangement: but he should have done more; and have distinctly said that he would abide by his rights as a holder of the stock of 1814.

With respect to Mr. Hopes, he was an active party in bringing about the arrangement of June 1831. He signed Mr. Pim's requisition;—he attended at the meetings; and he cannot now be permitted to recede from the arrangement then adopted; for by his conduct he may have induced other proprietors of the stock of 1814 to accede to the terms of that arrangement.

I am therefore of opinion that the bill ought to be dismissed: but, the construction of the act of Parliament being doubtful, and upon the other circumstances in the case,—without costs.

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THOMAS SPARKS and RICHARD SPARKS,

Plaintiffs.

GEORGE HEENAN, Administrator of the Rev. WILLIAM
PARSONS, deceased,

Defendant.

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Nor. 5.

(In the Rolls.)

A sequestrator appointed over a parish, at the suit of certain judgment creditors of the incumbent, presented a memorial under the 1 & 2 Vict. c. 109, for arrears of tithe composition *due before the sequestration issued*, and a certain sum was accordingly lodged in the Treasury on account of those arrears; but before payment, the incumbent died, and, the memorial having stated, by mistake, as it was alleged, that he was the person entitled to the arrears, his personal representative claimed the money in the Treasury against the sequestrator, and the Officer consequently refused to pay either party without the order of this Court. Whereupon, a bill was filed in the names of the sequestrator and the judgment creditors, in whose behalf he was appointed, as co-plaintiffs, against the personal representative of the incumbent, stating the foregoing facts, and praying that the sequestrator might be decreed to be the person entitled to receive the money in the Treasury: *Held*, that a general demurrer should be allowed to the bill upon two grounds:—first, that the sequestration was not retrospective but attached the future accruing tithe only; and, therefore, did not entitle the plaintiffs to the money in the Treasury; secondly, that, at any rate, the sequestrator could have had no interest or title in this suit, and should not have been made a co-plaintiff.

THE bill in this cause stated, that in the year 1832, the Rev. William Parsons, then of Tullamakey in the Queen's County, and since deceased, executed two bonds, one of which was conditioned in the penal sum of £711. 3s. 1d., and the other in the penal sum of £420, with warrants of attorney for confessing judgments thereon, to the plaintiffs Thomas and Richard Sparks, as trustees for the plaintiff Eliza, wife of William Usher, to secure the payment of two principal sums of £355. 11s 6d., and £210, with legal interest; that judgments having been duly entered thereon in the Court of Queen's Bench, as of Trinity Term 1834, and the said Rev. William Parsons being then resident in the County Tipperary, writs of *fi. fa.* in execution of the said judgments were issued to the sheriff of that county, who returned *nulla bona, &c.*, and that Mr. Parsons was a beneficed clerk and incumbent of certain parishes in the said county then under tithe composition; that on the 4th of November 1837, the plaintiffs issued writs of sequestration to the diocesan, the then Archbishop of Cashel, since deceased, who thereupon appointed the plaintiff James Egan as sequestrator over the said parishes, at the desire of the plaintiffs Usher and wife and her trustees; that "there being an arrear of about three years' tithe composition in said parishes then due to the plaintiff James Egan as such sequestrator," he, finding it impossible to procure a satisfactory settlement from the parishioners, was advised to accept the commuted allowance under the 1 & 2 Vict. c. 109, for payment of such arrears,* and accordingly directed one George Bradshawe, who had been the tithe proctor of the said Rev. William Parsons, and latterly the agent of said James Egan as such sequestrator, to prepare schedules pursuant to the statute;

* 1 & 2 Vict. c. 109 (15th August 1838), section 34, provides that the residue of the million loan, remaining after satisfying the purposes of the million act (3 & 4 W. 4, c. 100), with certain other funds should be applicable to the arrears of tithe composition for the years 1834, 1835, 1836 and 1837.

that Bradshawe prepared the schedules shewing the arrears, &c., and having annexed them to the usual memorial, as Egan's agent attended and lodged the same at Dublin Castle on the 11th of November 1838, for the benefit of said Egan as such sequestrator; that through mere error and mistake, the said Bradshawe had affixed the name of the said Rev. William Parsons to the said schedules and memorial as the person to whom the said arrears were due; and that the said Rev. William Parsons had died upon the Continent on the 19th of August 1838, although the fact of his death was not known either to the plaintiffs or the said Bradshawe at the time of presenting the said memorial, &c.—It charged that even if Mr. Parsons had been alive at the time, he would not have been entitled to the said arrears, and that “the plaintiff James Egan, as such sequestrator, was then and is now the only person entitled to receive the said arrears of tithe composition, which were vested in him by said writs of sequestration so issued and in force as aforesaid, same never having been returned by the said Archbishop;”—and further stated, that there was upwards of £600 due upon the plaintiff's judgments, and that by reason of the said memorial, &c., and in pursuance of the provisions of the said statute, a sum of £375. 16s. 3d. was lodged with the proper Officer at the Treasury of Dublin Castle, for payment of the said arrears of tithe composition; but that the defendant George Heenan, another of the creditors of the said Rev. William Parsons, having shortly after the said Parsons's death obtained letters of administration of his effects, &c., sent in a claim for the said sum of £375. 16s. 3d., so lodged in the Treasury for payment of the said arrears; in consequence of which the Officer declined to pay out the said sum, either to the plaintiffs or to the said Heenan, without the order of this Court.—It prayed “that the said sum of £375. 16s. 3d. so lodged in the Treasury of Dublin Castle, should be decreed to the said plaintiff James Egan, as such sequestrator, and the person alone legally entitled to same”—“and the defendant George Heenan declared a trustee for the plaintiff James Egan as to same, and ordered to execute all and every proper receipt, receipts, and vouchers, that may be necessary to enable the said plaintiff to receive the same, or to authorise the Officer at the Treasury to pay,” &c.

To the foregoing bill the defendant demurred generally.

Mr. *W. Smith*, for the demurrer.—There are several grounds of general demurrer to this bill:—

1. The plaintiffs have not alleged that the sequestration under which they claim, ever was published; therefore, they have not shewn any title: *Doe d. Morgan v. Bluck (a)*; *Bennett v. Apperley (b)*.

(a) 3 Campb. 447

(b) 6 Barn. & Cr. 680.

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2. The sum of money to which the plaintiffs endeavour to derive title under the sequestration, is for arrears due prior to issuing the writ, *i. e.* prior to the 4th November 1837; although the writ is for future accruing profits only: *Waite v. Bishop* (a).

3. A sequestrator has no title to sue without the Bishop; *Berwick v. Swanton* (b).

4. There is a misjoinder of co-plaintiffs. Egan, the sequestrator, should not have been a plaintiff, as he has no interest in the subject-matter of the suit; or if he is the person entitled, then the complainants, Usher and wife and Thomas and Richard Sparks are plainly unnecessary and improper parties, and this is good ground of general demurrer: *King of Spain v. Machado*; (c) *Cuff v. Platell* (d).

Mr. *R. C. Walker*, in support of the bill.—The statements in the bill sufficiently shew that the sequestration was regular in all respects, and it must now be taken to have been so. The writ of sequestration issued in 1837, and entitled the sequestrator to the tithe composition for that year, or the commuted allowance for the arrears of that year, under the 1 & 2 *Vict.*—The third ground of objection, *viz.*, that the Bishop should have been a party, is clearly untenable. Before the memorial was presented, the plaintiff Mr. Egan endeavoured to enforce the payment of the tithe composition; and, for that purpose, filed a bill in the Court of Exchequer in the names of the late Archbishop of Cashel and himself as co-plaintiffs, against several of the parishioners. The suit abated by the death of the Archbishop. Afterwards, the defendants came in to apply against the surviving plaintiff Mr. Egan for certain costs; and it was objected to the motion, that the suit had abated by the death of the Archbishop; but the Court disallowed the objection, on the ground that the Archbishop was a merely formal and unnecessary party (e). The fourth objection, as to misjoinder of the co-plaintiffs, is likewise untenable: the demurrer admits that they are all interested.

MASTER OF THE ROLLS.

Perhaps, a sufficient answer has been given to Mr. *Smith's* first and third objections; but I am clearly of opinion, that upon the second and fourth grounds, the demurrer must be allowed. The money in the Treasury office is for the arrears of tithe composition for three years, of which the year 1837 is the latest. The sequestration on which the

(a) 1 Cr. Mee. & R. 507. (b) 2 Gwill. Tithe Ca. 537, and see *ibid.* 610.

(c) 4 Russ. 225.

(d) 4 Russ. 242. See also, *Calv. Part.* 212-13.

(e) See the case fully reported, 2 Ir. Eq. R. 68, and the judgment of Pennefather, R., p. 85.

plaintiffs rely did not issue until the 4th of November 1837 (a) ; and the case of *Waite v. Bishop* decides expressly that a sequestration is not retrospective, and attaches the future accruing profits only. But even supposing the sequestration had attached the arrears, and so entitled the execution creditors to the fund in question, they only should have been the plaintiffs (b). Mr. Egan was the mere receiver, and this is not like the case where the institution of a suit becomes a part of the receiver's duty for the purpose of realising the fund ; here, the fund is realised, and the question respecting it is one between the judgment creditors who issued the sequestration and the personal representative of the late Mr. Parsons, in which the sequestrator has no right or interest whatever. I am therefore of opinion that the demurrer must be allowed, and with costs.

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(a) See the note, *ante*, p. 50.

(b) That is, as it is presumed, Richard and Thomas Sparks only should have been plaintiffs—see *Franco v. Franco*, 3 Ves. 76.

EDWARD RING, and JANE his Wife,

Plaintiffs.

NETTLES and others,

Defendants.

MR. HAIG, on behalf of the plaintiff Jane Ring, moved for liberty to amend the bill in this cause, by striking out the name of the plaintiff Edward Ring, the husband of the said Jane, who had lately become an insolvent, and by introducing instead the name of Thomas Ring, as her next friend ; and also, by making the said Edward Ring and his assignee parties defendant.

Mrs. Ring's affidavit stated that the suit related exclusively to her separate estate ; that the defendants had put in three short answers, and by their litigious conduct had so impoverished her husband, that he had lately been obliged to take the benefit of the Insolvent Act ; that Thomas Ring, the person whom it was proposed to introduce as a plaintiff instead of the said Edward, to sue as her next friend, was willing to become so, and to be answerable for any costs, whether already incurred or to be incurred, to which the defendants, or any of them might be entitled by a decree.

the names of the husband and his assignee as parties defendant, upon the terms of the proposed next friend giving security by recognizance, with sufficient sureties, for the costs already incurred ; the Court declining to require such security for future costs.

Rolls.
Nov. 9 & 10.

After the defendants had answered in a suit by husband and wife, relating to the wife's separate estate, leave given to amend the bill by striking out the name of the husband as a co-plaintiff, he having lately become insolvent, and by substituting in his stead the name of a party to sue as the wife's next friend, and also by inserting

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Mr. *Rogers*, for the defendants, submitted, that if the Court should be disposed to grant the motion, it could only be upon the terms of the proposed next friend giving security by recognizance with sufficient sureties for all costs already incurred or to be incurred: *Lawley v. Halpen* (a); *Sweeny v. Hall* (b); *England v. Downs* (c).

Mr. *Haig*, in reply, said that in *Sweeny v. Hall*, the Court required security for the by-gone costs only: and because, in that case, both the plaintiff to be withdrawn from the record, and the person to be substituted in his stead, were insolvent debtors, sureties were necessary. But in the present case, the effect of the proposed amendment would be to give the defendants a solvent plaintiff, who was willing to be liable for all the costs to which they might be entitled by the decree, instead of an insolvent plaintiff who could pay nothing;—that neither *Lawley v. Halpen* nor *England v. Downs* were authorities for requiring sureties.

MASTER OF THE ROLLS.

I shall give leave to amend as desired, upon the terms of Thomas Ring, the proposed next friend, giving security by recognizance, with sufficient sureties, to be approved by the Master, for the by-gone costs. That is the rule where it is sought to withdraw a co-plaintiff from the record; but I do not see why I should require security for future costs, and therefore cannot follow the case in *Beavan* to that extent.

(a) Bunb. 110.

(b) 1 Ir. Eq. R. 22.

(c) 1 Beav. 96. See also, *Platel and Wife v. Cradock*, 1 C. P. Coop. 469.

LOUGHNY and Wife v. DILLON.

(*Equity Exchequer.*)

UPON the final hearing of this cause, which was a judgment creditors' suit for the administration of the assets of the deceased conusor,

Mr. J. J. Murphy, appeared on behalf of Ennis, the second reported judgment creditor, and submitted that he was entitled to certain costs incurred by him in litigating, in the office, and reducing the amount claimed by the plaintiff (the first reported judgment creditor,) to be due on foot of his judgment. Ennis had instituted a suit in Chancery for payment of his demand; but was restrained from proceeding therein, and compelled to prove under the decree in this cause. No exception had been taken to the report, nor had any special case been made thereby.

Mr. Hickson for the plaintiff, objected that he was not a party to this cause, but had merely proved his demand in the office, under the decree.

PENNEFATHER, B.

Then he has no right to appear on this hearing; and the Court cannot make any order with respect to his costs.

O'BRIEN, *Petitioner.*

KENNY, *Respondent.*

Administrator of O'CALLAGHAN, *Petitioner.*

Co-heiress of KENNY, . . . *Respondent.*

THE prayer of the petition in the second matter was that the proceedings in the first matter be revived; and that the receiver appointed therein be extended to the second matter.

The petition and affidavit verifying it stated the recovery of a judgment by O'Callaghan against Kenny; its revival within a year; and the sum due for principal, interest and costs, on foot of it:—that a receiver

creditor, order the proceeding in the first matter to be revived, and the receiver appointed therein to be extended to the second matter; but will order that the receiver already appointed, be appointed in the matter of the second petition.

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Equity Exch.

Nov. 14.

A creditor, who proves his demand under a decree for the administration of assets, will not be heard upon the final hearing of the cause to ask for costs incurred by him in the office in reducing the plaintiff's demand: there being no special case made for that purpose by the report.

Nov. 14.

The matter of a petition under the 5 & 6 W. 4, c. 55, having abated by the death of the respondent, the Court will not, on the petition of another judgment

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had been appointed in the first matter on foot of a judgment, over the lands of the conusor : that the conusor had afterwards died, leaving the respondents in the second matter, his co-heiresses-at-law. There was no privity between the petitioner in the second matter, and the parties to the first matter. The receiver still continued to act, notwithstanding the abatement.

The prayer of the petition was now moved ; and it was argued that the language of the 5 & 6 W. 4, c. 55, s. 32, was general, and authorised any person interested in the proceedings in the matter of any petition, to move to revive the same ; and that the petitioner in the second matter was interested in reviving the proceedings in the first matter, in order that he might extend the receiver appointed therein to his matter:—

But the COURT* said that those only were interested in the proceedings in the matter, within the meaning of the act, who derived their title under or in privity with the parties to it : and they gave a conditional order to appoint the receiver in the first matter to be the receiver in the second matter.

* BRADY, C. B., and RICHARDS, B.

DRAKE, Executor of L. GANNON, v. FORDE, Administrator of J. GANNON.

Nov. 14.

A simple contract creditor, who institutes a suit for the administration of personal assets, and seeks to have his costs as against judgment and specialty creditors who may come in under the decree, ought to shew that a suit was necessary for the due administration of the assets, and payment of his debt ; or else that by his exertions, he has made a fund available, which would otherwise have been lost.

UPON the final hearing of this cause, it appeared that the bill was filed by the plaintiff, a simple contract creditor of J. Gannon, for the administration of his assets, which were stated to consist of personal estate only. J. Gannon died intestate on the 27th of August 1837. The defendant, a creditor, obtained administration of his effects on the 15th of February 1838 ; and on the 26th of the same month, this bill was filed. It was admitted at the bar, that the plaintiff had not, previous to the institution of this suit, made any demand on the defendant for payment of his debt. By his answer the defendant claimed a right to retain in respect of a simple contract debt due to him ; and stated that the assets were insufficient for the payment of the debts, and that, therefore, the same ought to be administered under the decree of the Court.

A decree to take an account of the personal estate of J. Gannon and of his debts having been pronounced, the Remembrancer reported that the personal estate consisted of timber (which was, at the period of his decease, growing on lands of which he was tenant for life ; but which,

under the provisions of the timber acts, his personal representative was entitled to cut), household furniture, hay and potatoes growing, farming implements, and arrears of rent due to him; of the value of about £1200; the whole of which, with the exception of about £150, arrears of rent, had been got in by the defendant: that of the personal estate so got in, the administrator had paid £866 into Court to the credit of the cause; that he had disbursed £125, and retained in his hands a balance of £251. That the intestate was indebted to the defendant in the sum of £134, and to the plaintiff in the sum of £724, both of which debts were by simple contract; to Patrick Dillon in the sum of £550 upon a judgment; and to five other persons in various sums, amounting in the whole to about £400, by simple contract. It was not denied but that Forde, the administrator, was perfectly solvent.

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DRAKE
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FORDE.

Mr. Collins, Q. C., Mr. H. Martley and Mr. Hughes, for the plaintiff.

The fund is deficient to pay the plaintiff his demand: but he is entitled to be paid the costs of the suit in priority to all other claims on it; *Larkins v. Paxton* (a); *Barker v. Wardel* (b). This is a suit for the administration of personal assets, in which the plaintiff has realised the fund, and is, therefore, entitled to his costs in priority, according to the opinions attributed to this Court in *Gray v. Crawford* (c), and *Thornley, Executor of Maguire, v. Dundas* (d).

The *Solicitor-General*, and Mr. Monahan, Q. C., for the defendant.

The administrator is entitled to retain the debt due to himself; and to his costs in priority to the plaintiff's right to the costs of the cause; and he does not lose that right by paying the assets into Court; *Chisum v. Dewes* (e).

Mr. Bennett, Q. C., and Mr. C. Andrews, for Dillon.

In this case all the assets are legal; and this Court will administer them as they would be administered at law. The judgment creditor is, therefore, entitled to be paid his demand in priority to all the other debts which have been proved. Nor does this case come within the exception to the general rule of the Court, that the costs are to be paid in the same priority with the demand of the party. Here there was no difficulty in administering the estate at law; the administrator is confessedly a solvent person; and it appears that the funds have been realised by him and not by the exertions of the plaintiff. There is no

(a) 2 M. & K. 320.

(b) 2 M. & K. 818.

(c) Jo. & Ca. 174; S. C. 1 Ir. Eq. R. 274.

(d) Jo. & Ca. 2; S. C. 1 Ir. Eq. R. 25.

(e) 5 Russ. 29.

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pretence for saying that these are salvage costs; *Gray v. Crawford* (a); *Thornley, Executor of Maguire, v. Dundas* (b); *Taylor v. Gorman* (c).

BRADY, C. B.

We do not see, in this case, any reason for departing from the ordinary rule of Court. If it were a settled rule, that in all cases a creditor filing a bill for the administration of personal assets is, as a matter of course, entitled to his costs out of the fund, the Court must abide by it; but we do not find that such a rule has been established. On the contrary, in *Gray v. Crawford* (d), I find Baron PENNEFATHER expressing himself thus:—"A distinction indeed exists with respect to those cases wherein the fund consists of personalty, which is scattered, and not tangible in its nature. In such cases, a *puisne* creditor, who by his exertions has made the fund available, has been considered as a sort of salvage creditor; and, as such, has been held entitled to his costs, without reference to the priority of his demand; but beyond that I conceive the rule does not extend." There a plain distinction is taken, namely, that where the fund is made available by the exertions of a *puisne* creditor, his costs are in the nature of salvage costs, and are to be paid in priority: manifestly implying that where the *puisne* creditor unnecessarily institutes the suit, it is not of course to give him his costs. Sir A. Hart also appears to have taken the same view of the subject; for in *Bennett v. Going* (e), I find him saying:—"The usual practice now certainly is, when a suit has been fairly instituted for the administration of assets, that the first payment, after the payment of the costs of the executor who has not disentitled himself to costs, is to be the payment of the costs incurred by the plaintiff in that suit." That is quite in conformity with the opinion of Baron PENNEFATHER in *Gray v. Crawford*; and both shew that there is a discretion vested in the Court with respect to this matter. That being the case, I think it would neither be wise or prudent in the Court to abandon the exercise of that discretion. Were we to establish a rule, that in all cases the party instituting a suit for the administration of personal assets, was to get his costs in priority out of the fund, whether it was forthcoming and to be got in upon asking for it, or not; or whether the plaintiff had or had not any fair prospect of its ever reaching his demand, or any good reason to suppose, that unless a bill were filed, it would be lost,—it would have a most mischievous effect. If we have a discretion upon the subject, and I think we have, we should be abandoning a most wholesome jurisdiction, were we to lay down such a general rule. Having then that discretion, I think that we shall exercise it pro-

(a) Jo. & Ca. 174; S. C. 1 Ir. Eq. R. 274. (b) Jo. & Ca. 2; S. C. 1 Ir. Eq. R. 25.

(c) 1 Dru. & W. 235. (n.)

(d) 1 Ir. Eq. Rep. 275.

(e) 1 Mol. 530.

perly in this case, by refusing the plaintiff's application. The personal estate was not considerable; it was not scattered abroad, nor was it difficult to get in: nevertheless, we find that the suit was instituted seven days after the grant of the letters of administration to the defendant.

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PENNEFATHER, B.

I am of opinion that in this case we ought not to give the plaintiff his costs in priority. It does not appear that this suit was necessary for the due administration of these assets; or that it can be considered that they have been so realised by the exertions of the plaintiff, as that he ought to be held to be a salvage creditor. What has been said by the late Chief Baron, in *Gray v. Crawford*, is well worth attending to;—that it is desirable that the person instituting the suit, should have an interest in husbanding the fund; that when he files his bill, he ought to have a reasonable expectation of getting something himself from the fund. It appears to me that the rule may fairly be stated to be, that a simple contract creditor, who institutes a suit for the administration of personal assets, and seeks to have his costs as against judgment and specialty creditors who may come in under the decree, ought to make a case for it by his bill, and shew that a suit was necessary for the due administration of the assets;—from their being complicated and difficult to ascertain, from a multiplicity of demands on the estate or other causes. If the plaintiff can shew such a case, or that by his exertions property has been made available which would otherwise probably have been lost, he will be entitled to his costs. But there is no general rule in this Court, that a simple contract creditor filing a bill for the administration of personal assets, shall have his costs as against judgment or specialty creditors. I admit that the cases decided by Sir C. Pepys, M. R., do *apparently* contravene the position, that any discretion upon the matter rests with the Court; I say, *apparently*,—for the reports do not put us in possession of the grounds of those determinations. We, however, have not any such rule in this Court; and it appears to me that a simple contract creditor, who seeks to get the costs of a suit instituted by him to the prejudice of a judgment creditor, is bound to shew that his suit was necessary for the due administration of the assets, and payment of his debt; or else, that by his exertions against a defaulting executor or administrator, he has made a fund available which would otherwise have been lost. We ought not to lay down a rule which would hold out an inducement to the filing of several bills against an executor or administrator, by offering, as a premium to the creditor who should first obtain a decree, the payment of his costs, at all events, out of the fund. In the present case, the bill was filed without any necessity for it, or any advantage from it to the fund; and

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before reasonable time was given to the administrator to collect and ascertain the property.

FOSTER, B.

I am also of the same opinion. I consider that such a rule as that contended for, would, if established, hold out an inducement to the institution of suits, in which the only object would be the recovery of the plaintiff's costs.

RICHARDS, B.

I fully concur in the order the Court is about to pronounce; which, in my opinion, does not at all conflict with the cases that have been decided by Lord Cottenham, when Master of the Rolls. I am sure that Lord Cottenham never intended to lay down this principle; that a simple contract creditor who files a bill for the administration of assets, is in every case entitled to the costs of the suit. It would be absurd to imagine that any Judge of a Court of Equity intended to lay down such a principle. Costs are always in the discretion of the Court, and are to be given or withheld as the Court, upon the hearing, sees that the suit has been instituted properly or improperly. Now, no person can suppose, that in a plain case in which the assets may be administered without the intervention of a Court of Equity, it is the privilege of any creditor needlessly to involve the funds in the awful expense of an equity suit. I am disposed to concur in what I understand to be the true principle to be extracted from the cases decided by Lord Cottenham;—that if a suit be properly and necessarily instituted by a simple contract creditor for the administration of personal assets, he shall get his costs in priority of the demand of any other party in the cause; for his costs in such a case would, in my opinion, be incidental to the administration of the assets; and I would not draw any distinction between a suit so instituted by him, for the administration of personal assets, and a suit for a similar purpose instituted by a judgment creditor or any other person,—supposing that in each case the suit was properly instituted, and that thereby the assets of the debtor were brought into Court, and there administered. In the present case, if I were satisfied that the suit was instituted properly and *bonâ fide*, I would be of opinion that the plaintiff was entitled to the costs of it, and that he was so entitled in the first instance; but it appears to me that the suit was not *bonâ fide*; that it was one which ought never to have been instituted, and that this is a case in which the Court ought to discountenance such wanton and speculative litigation. The assets were inconsiderable, and no difficulty existed as to their distribution. There was but one judgment debt, which was the first demand to be paid; there was then the debt due to the personal representative to be retained—

and the residue of the assets to be distributed rateably amongst a few simple contract creditors: nevertheless the plaintiff, without making any demand on the administrator—within six months after the death of the intestate, and ten days after the grant of administration, files this bill. If a Court of Equity was constrained to give the plaintiff his costs, under such circumstances, it would be, in my opinion, a public nuisance, and ought to be abolished by act of Parliament.

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—
ADAIR, *Petitioner.*
JOHNSON, *Respondent.*

THIS was a petition under the 1 & 2 *Vict. c. 109, s. 16.* It stated a certificate of tithe composition made for the parish of Donegor, in the diocese of Connor and county of Antrim, whereby the Commissioners certified that the true and just composition for all tithes within the parish was £765. 10s. 9d.; of which the sum of £393. 7s. 10½d. was payable to the Rector and Vicar, in the proportions therein specified, out of that part of the parish not included in the Grange of Nilteen; and the sum of £372. 2s. 10½d. was payable out of the Grange of Nilteen. The petition then set forth a claim on behalf of the owners and occupiers of Nilteen, to be exempted from the payment of tithes by reason of the non-payment thereof for the period mentioned in the 1 & 2 *Vict. c. 109, s. 18*; and it prayed that the Grange of Nilteen might be declared to be tithe free; and that the certificate and applotment might be amended accordingly.

Nov. 27.
The Registrar of the diocese is the proper Officer to amend the tithe certificate and applotment, pursuant to an order made under the 1 & 2 *Vict. c. 109, s. 16.*

The COURT referred it to the Remembrancer to inquire and report whether the Grange of Nilteen was tithe free; and in the event of his so reporting, declared that it was tithe free; and ordered the certificate and applotment to be amended by the proper Officer, accordingly.

By his report, the Remembrancer found that Nilteen was at the time of the composition, tithe free, and not subject to or rightfully chargeable with tithe composition, and not now liable to tithe composition.

The petitioner then applied to the Registrar of the diocese of Connor, to amend the certificate and applotment pursuant to the order of the Court; but the latter declined, saying that it did not appear that he was the proper Officer to amend the same.

Mr. *Gilmore*, Q. C., for the petitioner, now moved the Court that the Registrar of the diocese of Down and Connor do amend the certificate of the composition of the parish of Donegor, and the applotment book

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thereof, by expunging therefrom such parts thereof as relate to the Grange of Nilteen.

Upon the former occasion, when the order of reference was made (7th February 1840), it appeared that the amount of the composition certified to be payable out of Nilteen did not form part of the sum ascertained, upon the average of the preceding seven years, to be payable by the parish of Donegor in general.

RICHARDS, B.,* granted the application in execution of the former order of the 7th of February 1840.

* *Solus.*

KNOX v. O'BRIEN.

Nov. 27.

Per RICHARDS, B. If the plaintiff's attorney will fully in the bill describe the plaintiff as resident within the jurisdiction when in fact he is resident out of the jurisdiction, he will be ordered to pay the costs of the motion to stay the proceedings until security for costs be given.

MR. KELLER for the defendant moved that the proceedings in this suit be stayed until the plaintiff give security for costs: upon an affidavit which stated, that in the bill the plaintiff was described as "of the city of Cork;" and that the defendant had, after many inquiries, lately ascertained that the plaintiff was then, and had been for four years previously, resident in the United States of America; and had no residence in Ireland.

RICHARDS, B.*

The defendant is clearly entitled to the order, upon that state of facts; and if his notice goes to that extent, I think he is also entitled to have the costs of this motion paid him by the attorney for the plaintiff. The attorney had no right to describe the plaintiff as of the city of Cork, when for the four years preceding, he was resident in America; which he must have been aware of.

* *Solus.*

R. MANDERS v. E. MANDERS and others.

1840.
Equity Exch.

SIKES, Assignee of E. MANDERS v. R. MANDERS, E. MANDERS
and others.

Nov. 27.

MR. MALEY, for the plaintiff in the second cause, moved that publication of the depositions taken in the first cause be respited until one fortnight after the defendants in the second cause should have filed a full answer to the plaintiff's bill in the second cause.

E. Manders, being entitled to a lot of ground, on which he had built several houses, in 1824 applied to R. Manders, his brother-in-law, for a loan of £2000, to be secured by a mortgage of the houses. To this R. Manders consented, on condition that E. Manders would settle the equity of redemption on himself, his wife, and family; which he accordingly did by deed bearing equal date with the mortgage, and thereby reserved a life estate to himself. This life estate he in 1817 mortgaged to R. Manders to secure a further sum of £1300; and in 1828 he sold his equity of redemption therein to R. Manders for £400. He was shortly afterwards discharged as an insolvent. R. Manders went into the receipt of the rents of the mortgaged premises (except one house in which E. Manders and his family resided), and so continued until 1838, when the latter was again discharged as an insolvent; and the plaintiff in the cross-suit was, in December 1839, appointed his assignee. Previous to that appointment the bill in the first cause was filed against E. Manders, his wife and children, and the trustees of their settlement, to foreclose the mortgage for £2000, and for a sale; and it prayed that after payment of the mortgage, the surplus money of the sale might be brought into Court to be secured for the uses of the settlement of 1824.

On the 31st of January 1840, the plaintiff in the original cause filed a supplemental bill, to bring the assignee of the insolvent before the Court: it was answered by him on the 1st of May 1840; and on the 23rd of July 1840, the cross-bill was filed against the plaintiff and the defendants in the original suit, to set aside the settlement of 1824 as fraudulent and void against creditors. No process had been obtained against the defendants in the cross-suit; nor could it have been obtained, the defendants having entered the ordinary rule for time to answer. Issue was joined in the original cause on the 31st of July 1840.

Mr. Brewster Q. C., and Mr. Dickson, for the plaintiffs in the original cause. R. Manders is ready to file his answer forthwith; and he should not be delayed in his suit until the insolvent puts in his answer to the cross-

If the plaintiff in the cross-cause have not been guilty of *laches*, it is almost of course to respite publication in the original cause, so that there may be but one examination, and that both causes may be heard together.

Publication in the original cause respited until full answers put in by the defendants in the cross-cause; though the sole plaintiff in the original cause was ready to file his answer at once, and could not compel the other defendants to answer: the plaintiff in the cross-cause undertaking to proceed with effect to enforce their answers.

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bill. It is not of course to respite publication in a case like the present, where the plaintiff in the cross cause has not obtained process against the defendants.*

RICHARDS, B.†

Unless the plaintiff in the cross-cause has been guilty of *laches*, it is almost of course that there should be but one examination, and that both causes should be heard together. But I will not pronounce an order which would have the effect of absolutely respiting the publication of the depositions in the original cause until the insolvent answers the cross-bill; but will limit it to the time within which he may be compelled to answer. The order I shall make is, to respite publication in the original cause until one fortnight after the several defendants in the cross-cause shall have answered the cross-bill; the plaintiff in the cross-cause undertaking to proceed with effect to enforce such answers; and if he shall delay in proceeding to enforce such answers, let the plaintiff in the original cause be at liberty to apply to discharge this order.

* See *Cooke v. Broomhead*, 16 Ves. 133; *Aylett v. Easy*, 2 Ves. sen. 336.

† *Solus*.

TOMB v. ORR.

Nov. 27, 28.

Semble, that the Court has not jurisdiction, under the 1 W. 4, c. 47, s. 11, to order the Remembrancer to execute the deed of conveyance in the name of a minor defendant.

Mr. JOY, for the plaintiff, moved the prayer of the petition:—that the Remembrancer do execute the deed of conveyance to the purchaser of the lands sold under the decree in this cause in the name of the minor defendants.

The suit was instituted to foreclose a mortgage, and for a sale. The defendants were the real and personal representatives of the mortgagor, and his devisees, who were infants of ages varying from six to eighteen years. The petition was presented under the 1 W. 4, c. 47, s. 11. In support of the application, *Jones v. Ham* (a) was referred to.

RICHARDS, B.†

Doubted whether the Court had jurisdiction to order their Officer to execute the conveyance in the name of the minors, and deferred making any rule until he had consulted the other members of the Court. On the following day, he directed that the order pronounced in *Jones v. Ham* should be followed in this case.

(a) *Post*, p. 65.

† *Solus*.

JONES v. HAM.

MR. BREWSTER, Q. C., for the plaintiff, moved the prayer of the petition in this case, which was, that the minor defendants might be ordered to execute the deed of conveyance of the lands sold under the decree, to the purchaser.*

The bill was filed to foreclose a mortgage. The defendants were the heir and personal representative of the mortgagor, and his devisees. The application was, that the minors should respectively execute the deed *proprid manu*.

The proper mode of bringing this matter before the Court is by petition. *Anonymous* (a); *Prytharél v. Howard* (b). The 10th section of the 1 W. 4, c. 47, takes from the infant defendant the privilege of having the *parol* demur; and, therefore, of a day being given to him by the decree to shew cause against it: *Powys v. Mansfield* (c). Accordingly, no day has been given by the decree in this case to the infants to shew cause against it:—but it is absolute in the first instance.—[RICHARDS, B. The 11th section applies to suits which have been already instituted. The 10th section does not do so expressly; and in this case, the bill was filed before the act was passed.]—That was also the case in *Powys v. Mansfield*. The 10th section relates to suits which shall be commenced *or prosecuted*. If it should be held that the defendants, the minors, ought to have a day given them by the decree to shew cause against it, it will deprive the plaintiff of the benefit intended to be conferred on him by the 11th section; for in such a case, the minor could not be called on to execute the conveyance until the time to shew cause against the decree had expired.—[RICHARDS, B. That consideration, I think, gives a construction to the 10th section, which would otherwise be ambiguous.—FOSTER, B. How old are the infants?—That does not appear by the petition; but it is stated that the youngest of them is about seven or eight years of age.—[PENNETHER, B. The age of the minors ought to be stated in the petition; for the infant is to convey in such manner as the Court shall direct.]—The petition shall be amended in that respect.

The order pronounced by the Court was—

Let the defendants Paul R. Ham, Patrick Ham, Bridget Ham,

(a) 1 Y. & C. 75.

(b) 6 Sim. 9.

(c) 6 Sim. 637.

* Vide 1 W. 4, c. 47, s. 11.

1837.

Equity Exch.

April 22.

May 10.

A petition under the 1 W. 4, c. 37, s. 11, should state the age of the minor.

Semble: that the 1 W. 4, c. 47, s. 10, applies to suits instituted before the passing of that act.

An infant defendant, entitled to a portion of the equity of redemption of lands decreed to be sold in a foreclosure suit, was ordered to execute the conveyance to the purchaser.

The decree did not give him a day to shew cause against it, on his coming of age.

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and Mary Ham, minors, execute the deed of conveyance to the purchaser as adults.*

* *Powys v. Mansfield* has been overruled by *Price v. Carver*, 3 M. & C. 157, in which Lord Cottenham, C., held that a decree of *foreclosure* against an infant must give him a day to shew cause against it, after he attains twenty-one, notwithstanding the 1 W. 4, c. 47, s. 10, 11. In *Schoelfield v. Heafield*, 7 Sim. 669, which was a suit instituted by an equitable mortgagee by deposit of title deeds, against the infant heir of the depositor, for a sale of the estate, the lands were decreed to be sold; *it appearing to the Court that a sale was more beneficial to the infant than a foreclosure*: and the Vice-Chancellor, after having consulted the Lord Chancellor, ruled that in that case the infant heir ought not to be allowed a day to shew cause against the decree, on coming of age: and afterwards, upon a petition being presented for the purpose, directed the infant heir to convey the estate (which had been sold under the decree) to the purchaser. 8 Sim. 470. But the reasons upon which the Court held that a day to shew cause ought not in that case be given to the infant heir, are not set forth in the report, and may be conjectured to have existed in the peculiar circumstances of the case: for the general rule is, that whenever a conveyance of an estate is decreed to be made by an infant, there he shall have a day to shew cause against the decree; *Sheffield v. Duchess of Buckingham*, 1 West, 684, and in *Price v. Carver*, Lord Cottenham says, "All cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the *parol* would demur at law, are cases in which a day is given: but the *parol* does not demur. Of all such cases the statute takes no notice, and affords no remedy for them, except that, by the 11th section, it enables the Court to take from the infant the legal estate of the property decreed to be sold for the payment of debts, but for that purpose only." It would therefore appear to be as yet undetermined, whether a decree of foreclosure and sale in Ireland, or a decree for the sale of the estate of an infant, should give a day to him to shew cause against it, when of age: and if so, how far the Court has jurisdiction under the 11th section to order an infant to convey an estate sold under a decree containing such a reservation.

In the matter of JOHN HENRY, a Bankrupt.
Ex parte CROSSFIELD.

(In Chancery.)

THIS was a petition presented by Messrs. Crossfield and Co., praying that they might be declared equitable mortgagees of certain premises mentioned in the petition, subject to a prior mortgage to Messrs. Johnson and Co.; and that the surplus of the produce of the sale of the mortgaged premises, after payment of the debt due to Messrs. Johnson and Co., might be applied in payment of the sum due to petitioners; and for a reference to the Commissioner of Bankrupt to ascertain the amount.

The petition stated the following facts:—

On the 5th June 1839, the bankrupt executed a mortgage of certain premises in Cavan to Messrs. Johnson and Co., for securing the debt then due to them, and any further advances which they might make, not exceeding £2000 and interest; and at the same time deposited with them the title deeds of the mortgaged premises.

In September 1839, the bankrupt applied to petitioners, who were then unacquainted with him, to sell him goods upon credit, and was introduced to them by Messrs. Johnson, who recommended him to petitioners as being independent of his trade, and possessed of considerable leasehold property.

Upon the strength of that recommendation, petitioners gave goods to the bankrupt, and drew a bill on him for the amount (£322. 18s.) at three months from the 2nd of September, which he accepted, and made payable at the house of Messrs. Johnson and Co., in London; and at the same time the bankrupt gave petitioners to understand that Messrs. Johnson and Co. had the mortgage, and would see the bill paid.

On the 31st of November 1839, the bankrupt, being unable to take up the bill, wrote to Messrs. Johnson to take up "the Liverpool bill payable at their house on the 5th December, and charge his securities with it." The bill drawn by petitioners was the only bill of the bankrupt payable at the house of Messrs. Johnson and Co. on that day, and was not paid when it became due. On the 10th December 1839, the bankrupt, in reply to the protest of his bill, which petitioners had sent to him, wrote to them, stating that when the bill became due he wrote to Messrs. Johnson and Co. to charge his securities with the amount, that their account was about £360, and asking them to renew his bill, which he stated was perfectly secure "in as much as the gentlemen who introduced me to you have the securities in their own hands, out of which I will not take them until your bill is honorably paid." In his letter to petitioners, the bankrupt enclosed a letter to Messrs. Johnson and Co. (which he directed

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Chancery.

Nov. 25.

A trader executes a mortgage of real estate, with a borrowing clause, and deposits the title deeds with the mortgagee. He subsequently accepts a bill drawn by third parties, and being unable to pay the bill when at maturity, writes to the drawer, to say that it shall be paid out of the produce of the mortgaged premises, and that he will not take his title deeds out of the mortgagee's hands until the bill is paid. The mortgagees communicate to the drawers their assent to the arrangement:—*Held*, that the drawers were entitled to an equitable mortgage.

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petitioners to forward), in which he adverted to his previous letter to them of the 31st of November, and requested them to write to petitioners on receipt of his letter, and inform them that they (Messrs. Johnson and Co.) held his securities until petitioners were paid, and stated that he had written to petitioners to acquaint them that he had lodged a security with them Messrs. Johnson and Co.

The bankrupt's letter was forwarded to Messrs. Johnson and Co. by petitioners, who, on the 22nd of December 1839, received a letter in reply from them, stating that the mortgaged premises were worth more than their lien, and that they would be happy to act upon their instructions, and hold the mortgaged premises until the debt due by the bankrupt to petitioners was paid; and upon the faith of these representations, and upon the security of the mortgaged premises, petitioners were induced to give time to the bankrupt and to take a renewed bill for £200 of the sum due, which however was not paid.

On the 27th of February 1840, the bankrupt wrote to petitioners, stating that their account was perfectly safe, and that in case he had no cash after settling with the Messrs. Johnson, and "lifting his title" deeds from them, he did not see any reason why he would not hand "them over to petitioners;" and subsequently the bankrupt sent to petitioners a rental of the mortgaged premises.

On the 28th of May 1840, a commission of bankrupt was issued against Henry, founded on an act of bankruptcy committed early in May, under which he was duly found a bankrupt, and Messrs. Johnson and Co. were about to proceed to a sale of the mortgaged premises.

Mr. *Blake* Q. C., with whom was Mr. *J. D. Fitzgerald*, now moved the matter of petition.

When a claim of an equitable mortgage is set up, the Court will decide the question in the first instance, without sending it to the Commissioners as formerly, *Ex parte Smith* (a). In order to constitute an equitable mortgage, an actual deposit of deeds is not necessary, *Ex parte Jones* (b). An agreement between the holder of bills and the acceptor, that the bills should be paid out of the proceeds of property, of which the deeds were then in the hands of a solicitor for sale, to which the solicitor was a party, was held to create an equitable mortgage, *Ex parte Greenhill* (c).

Mr. *Litton*, Q. C., for the assignee.—The original dealing here was in September 1839, the alleged mortgage in December. An equitable mortgage must be created when the money is first advanced, and here

(a) 1 Dea. & Ch. 441.

(b) 4 Dea. & Ch. 750.

(c) 3 Dea. & Ch. 334.

the original dealing was merely upon a personal security : nothing was said of a mortgage of any kind ; it was not until the bill was dishonored that any agreement is alleged to have been made for a mortgage. Even then, the letters amount merely to a direction to Messrs. Johnson and Co. to pay the amount of the bill, and add it to their debt, which they did not act upon. In *Ex parte Whithead* (a), Lord Eldon held, that where deeds were deposited with one man, as a security for money advanced by him, and an agreement was made, that they should be a security in his hands for money advanced by a third person, that third person was not entitled to an equitable mortgage ; and at the same time expressed his disapprobation of the doctrine generally.

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THE LORD CHANCELLOR.

The case which has been cited from 19 *Vesey*, by Mr. *Litton*, does not appear to me to be applicable to the facts of the present. If Lord Eldon had decided that in such a case as the present, no equitable mortgage existed, I should feel myself bound by his authority and refuse the application. But he does not appear to me to have decided any such thing. He expresses his disapprobation of the doctrine of equitable mortgages generally, but that doctrine is now too well settled to be shaken, and I have only to decide whether it is applicable to the present case. Now, here there is an actual deposit of the title deeds, so that the observations of Lord Eldon which have been read by Mr. *Litton* have no application. In the case in *Vesey* there was no stipulation as to future advances, while here there is a borrowing clause, charging the mortgaged premises with any sums afterwards advanced, to the extent of £2000. It is quite true that it is not in the power of the mortgagee by any act of his own merely, to become a trustee for third parties, but this is not a dealing with the mortgagee merely. This is a dealing in which the bankrupt, the creditors, and the mortgagee are all parties, and that case does not decide that when all the parties interested agree that an equitable mortgage shall be created, that such an agreement is not valid : such an agreement I think exists in the present case, and I must therefore declare that the petitioners here are entitled to an equitable mortgage for the amount of their debt. If the assignee desire an inquiry as to the facts I shall give it to him, but it will be at the peril of costs.

(a) 19 *Ves.* 215.

1840.

*Chancery.*Nov. 20, 21,
23 & 29.

DILLON v. CRUISE.

Where a trust is created by will for the payment of debts, the right of a judgment creditor to the benefit of that trust is not affected by the 40th sec. of the 3 & 4 W. 4, c. 27.

THIS was a bill by a judgment creditor of Joseph Cruise, the testator in the pleadings named, on behalf of himself and all other creditors, to raise the amount of his judgment. Joseph Cruise, on the 3rd of October 1814, executed a bond, with warrant of attorney for confessing judgment thereon, in the penal sum of £200, conditioned for the payment of £100 with interest on the 30th October 1818, to a person of the name of William Clyne; and being seized of certain freehold lands, part of which was subject to a mortgage to Mrs. Henrietta Maria Martley, and being entitled to considerable personal property, by his will bearing date the 17th of January 1816, duly executed and attested for passing freehold estates, "devised and bequeathed to his wife Eleanor, and his sons, Francis, John, and Joseph, and to his daughters Bridget and Frances, and their heirs, executors and administrators, all his property, freehold and chattel, to be divided, share and share alike between them, subject, however, to the payment of his just debts, which he directed to be paid in the first instance; and directed that his personal property should be divided in like manner between his wife and children after payment of his debts;" and appointed James Mulaniff, Richard Rategan and Thoman Brennan executors. The testator died shortly after, without having revoked or altered his will, which was proved by Thomas Brennan, one of the executors named therein, alone, the rest having declined to act. Shortly after the death of the testator, judgment was entered as of Hilary Term 1816, upon the bond and warrant.

On the 27th March 1816, Brennan, who had alone proved the will, filed a bill for the administration of the testator's estate, against the mortgagee, against the devisees, and his two executors who had renounced, praying that the creditors of the testator might be restrained from proceeding at law or in equity, and might come in and prove their debts in that cause; that he might be at liberty to redeem the mortgage; and for an account of the personal estate of the testator, and of his debts, legacies, and funeral expenses: and that the deficiency of the personal estate for payment of the debts and funeral expenses might be decreed a charge on the real estate; and that a competent part thereof might be sold, and the trusts of the will carried into execution; and that a receiver might be appointed to receive the rents of the real estate.

On the 16th of August 1816, a receiver was appointed over the real estate, and the same person was directed to collect the outstanding personal estate. No further proceedings were taken in that cause,—and on the 1st November 1817, Mrs. Martley, the mortgagee of part of

the freehold estate, filed her bill to foreclose the mortgage, and a decree to account was pronounced in that cause, on the 20th November 1826; and by an order made on the same day, the receiver was extended to the mortgagee's cause.

On the 12th December 1826, a consent was entered into in both causes, by which it was agreed that the costs theretofore incurred in Brennan's cause should be taxed, and the amount proved in the mortgagee's cause, and all further proceedings in that cause stayed; and that the arrear of interest then due upon the mortgage should be discharged, and that the receiver should keep down the accruing interest on the mortgage. On the 19th January 1838, a final decree for a sale was pronounced in the foreclosure suit, in pursuance of which the mortgaged premises were sold, and the surplus of the purchase-money, after payment of the mortgage, and of prior incumbrances, continued in Court when the plaintiff's bill was filed,—and the receiver continued in possession of the property not included in the mortgage up to the hearing of the present cause.

The original donee of the judgment of 1816 having died, the plaintiff in this cause purchased the judgment from his executor for a sum of £186. 19s., as he alleged, and having obtained an assignment of it from the executor on the 1st of November 1839, filed his bill against the devisees of the real estate, and the executor of Joseph Cruise, in April 1840, praying that an account might be taken of the sum due on foot of the judgment, and also of the personal estate of the testator, and of his debts and funeral expenses, and that in case the personal estate should not be available, or should be insufficient for plaintiff's demand, then that the same might be declared to be a charge on the real and freehold estates of the testator, and the same, or a competent part thereof, might be sold, and that, if necessary, the trusts of the said testator's will might be carried into execution; and that the surplus produce of the sale of the mortgaged premises, in bank, might be impounded and transferred to the credit of the plaintiff's cause.

The executor by his answer admitted the validity of the plaintiff's claim, but the devisees insisted that as no payment had been made on account either of principal or interest, or no acknowledgment in writing given within twenty years next before the filing of the bill, the plaintiff was barred by the recent statute of limitations, 3 & 4 W. 4, c. 27. They also alleged that the plaintiff had purchased the judgment for a trifling sum of money, for the purpose of instituting a suit.

On the 23rd June 1840, the plaintiff obtained an order at the Rolls, impounding the surplus produce of the sale in *Martley v. Cruise*, to abide the decree in this cause, without prejudice to the rights of the parties. It appeared by the evidence that the sum actually paid for the judgment was £80. No evidence was given of any payment or acknowledgment in writing since the death of the testator.

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Mr. *W. Brookes*, Q. C., Mr. *Collins*, Q. C., and Mr. *H. G. Hughes*, for the plaintiff.

The plaintiff comes here in two rights; first, as a judgment creditor; second, as an equitable devisee under the direction in the testator's will for the payment of his debts, the trust for which he seeks to have carried into execution. The devisees are his trustees, and take the estate for the payment of the debts and *pro tanto* for the plaintiff. In the former character his claim may be barred by the statute of limitations; but in the latter he is not affected by it. That a devise, subject to the payment of debts, is equivalent to an express trust for the payment of them, appears from the cases respecting the obligation of a purchaser to see to the application of the purchase-money, in which no distinction is taken between the two; *Elliot v. Merryman* (a); *Walker v. Smallwood* (b). Lord Camden's judgment in the latter case has been cited and approved of by Lord Langdale, M. R., in a recent case; *Shaw v. Borrer* (c), where after going through the authorities, in his judgment p. 576, he says, "It seems clear, therefore, that a charge of this nature "has been and ought to be treated as a trust." Lands devised subject to the payment of debts have been always held to be equitable assets; *Newton v. Bennet* (d); and in the cases of *Hargrave v. Tindal*, and *Silk v. Prime*, which are stated in the note to that case in pp. 136 and 138, it was held that an estate descending to the heir charged with debts was equitable assets. In *Bolton v. Linda green* (e), Lord Thurlow held that a devise after payment of debts made the devised estate equitable assets; and in that case he says, "a charge is a devise *pro tanto*." In *Bailey v. Ekins* (f), Lord Eldon held that a mere charge constituted equitable assets; and in giving judgment, p. 322, he says, "A mere charge is no legal interest, it is not a devise to any one, "but a declaration of intention upon which Courts of Equity will "fasten, and by virtue of which they they will draw out of the mass "going to the heir or to others, that *quantum* of interest which "will be sufficient for the payment of the debts." In *Sheppard v. Lutwidge* (g), the same doctrine is acted upon by him, and he says in that case, that Lord Thurlow rested his doctrine upon the heir being rendered a trustee for the payment of the debts. Where such a trust was once credited it was held that the creditor's right against the real estate was not affected by length of time, *Hargreaves v. Mitchell* (h); and *Morse v. Langham* which is stated in the judgment of the Master of the Rolls, in *Burke v. Jones* (i). That doctrine was extended in *Jones v. Scott* (k), to personal property, but the deci-

(a) 2 Barnard, 78.

(c) 1 Keen. 559.

(e) B. C. C. 93.

(g) 8 Ves. 26.

(i) 2 Ves. & Be. 286.

(b) Amb. 676.

(d) 1 B. C. C. 134.

(f) 7 Ves. 319.

(h) 6 Mad. 326.

(k) 1 Russ. & My.

sion was reversed so far as the personal property was concerned, leaving however the doctrine so far as it applied to real estate untouched (a). That doctrine is unaffected by the recent statute of limitations (b), because as the devisees take as trustees for the plaintiff, according to the preceding authorities, his right as a *cestui que trusts* is not within the operation of the act. In *Fergus v. Gore* (c), Lord Redesdale held that the right of a creditor to take advantage of a trust for the payment of debts, was not affected by lapse of time, notwithstanding the provisions of the 8 G. 1, c. 4, which expressly names Courts of Equity, and limits the time within which the creditor shall be allowed to proceed for the recovery of his debt. In the case of *Kelly v. Kelly* (d), the Master of the Rolls held, that the existence of a trust prevented the operation of the recent statute of limitations. In *Philippo v. Munnings* (e), Lord Cottenham held, that when an executor had severed from the testator's assets the amount of a legacy which had been given to him upon certain trusts, the right of the legatee to make him account for it was not affected by the 40th section of the statute of limitations, for "the suit must be considered, not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust" and that it was not within the terms of the act. Even upon the construction of the act itself the plaintiff's right is saved. According to the law as it stood at the time when the act was passed, the plaintiff was, in consequence of the trust for the payment of debts, a devisee of the land *pro tanto*, and the 1st section, which is the glossary of the act, defines the word "land" to mean any "estate or interest in land;" the 24th section limits the time within which a suit shall be brought to recover "land or rent;" and the 25th section excepts out of that limitation the case in which "land or rent" shall be held upon an express trust. Now, in *Salter v. Kavanagh* (f), it was held, that a charge created an express trust. Brennan's bill prayed, that the trusts of the will might be carried into execution, the appointment of a receiver, and an injunction to restrain creditors from proceeding for the recovery of their debts; it was a suit therefore instituted for the benefit of the creditors, and the Court, by appointing a receiver over both the real estate and the personal property, took upon itself the execution of the trusts. If the personalty were wasted it must have been by the receiver, because the order appointing him is still in force. The executor states in his answer that the personalty was small, and that he is ready to account, and that he requested the creditor to wait until a fund was realised in the mortgage cause. That mortgage was prior to the plaintiff's judgment, and by the extension of the receiver to the mortgagee's cause in November 1826, the

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(a) 4 Cl. & Fin.

(c) 1 Sc. & Le. 107.

(e) 2 My. & Cr. 309.

(b) 3 & 4 W. 4, c. 27.

(d) 6 L. R. N. S. 222.

(f) 1 Dru. & W. 668.

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hands of the creditors were tied up. The rents of the mortgaged premises have been ever since applied in discharge of that mortgage; it has been paid off, and there is a fund Court produced by the sale. The devisees were parties to both causes, and the orders for the appointment and for the extension of the receiver were made on their consent. The judgment creditor could not have proved in either of these causes, because no decree was made in Brennan's cause, and the decree in the mortgagee's cause only directed an account of prior and contemporaneous incumbrances. If an order had been made in Brennan's cause, expressly restraining creditors from proceeding, could it be contended that they would be barred by the statute? and yet there is no provision in the statute for such a case, so that it must be admitted that there are cases in which this Court can give relief after the lapse of 20 years, besides those expressly provided for. The appointment of a receiver over the testator's property was tantamount to such an injunction, because the creditor could not have proceeded without incurring a contempt of this Court. If the testator had devised in trust to sell and divide the produce among children, could it be contended that after 20 years the children were barred? If he had charged it with a certain sum, and that the trustee went into possession, could it be contended that after 20 years the trustee could not be made account? and yet neither of these cases is within the express saving of the 25th section.

The act was not intended to interfere with the ordinary jurisdiction of Courts of Equity. There must be express words in a statute to take away the jurisdiction of the superior Courts. The act was intended to regulate proceedings between debtor and creditor, and not between trustee and *cestuy que trust*. Suppose a mortgagee in fee devises upon express trusts, that the devisee remains in possession upwards of 20 years without account, could that interfere with the rights of the *cestuy que trust* of the mortgage money? If there were a devise to a trustee upon an express trust for the payment of debts, and the trustee entered and remained in possession upwards of 20 years, could he set up that as a defence? If a judgment were assigned to a trustee, would the 40th section make him owner after 20 years? The case of *O'Kelly v. Bodkin (a)*, decrees that a bill filed by one creditor on behalf himself and others, saves the rights of those who may come in under the decree in that cause, although 20 years have elapsed without payment or acknowledgment in writing.

Mr. Warren, Q. C., Mr. Keatinge, Q. C., Mr. Monahan, Q. C., Mr. Dolphin and Mr. Brereton for the defendants.

This case comes before the Court divested of merits, on the part of the plaintiff, for he is an adventurer in the field of litigation, who has

(a) 2 I. E. R. 365.

purchased this judgment for a small sum, in the hopes of getting a decree for a large amount. The question, whether the debt is barred, comes before the Court for the first time. The object of the statute was the clearing of estates from old incumbrances after the lapse of 20 years, and except where there is an express saving, the provisions of it apply to every case, *Berrington v. Evans* (a). A judgment creditor is not affected by any section until the 40th. The first section expressly specifies the meaning to be applied to the words "land or rent;" and the words "whether freehold or chattel," in that definition shew clearly that it was intended to include only what was capable of being the subject of tenure, and could not apply to a judgment or charge. The 24th section limits the time within which a suit is to be brought for the recovery of land or rent; the 25th and 26th sections except out of the 24th, cases where land or rent is held upon an express trust, and cases of concealed fraud; and the 28th section authorises Courts of Equity to refuse relief, even in cases where the statutable period had not elapsed; but there is no provision enabling them to give relief where it has elapsed. These sections are all conversant with "land or rent," as defined in the 1st section; and all the sections down to the 10th section deal with "land or rent" exclusively. In the 40th section, the act deals with charges on land, and limits the time within which they are to be recovered, to 20 years. The words of that section are negative—"no action or suit shall be brought"—and the plaintiff must bring himself within one of the three classes of exception in that section. The 42nd section is analogous to the 40th, dealing with arrears of rent and interest; and the Court decided, in *Burne v. Robinson* (b), that the 25th section did not apply to a case within the 42nd section. Now, it would be easier to bring the 42d section within the 25th, than the 40th, because rent is within the terms of the definition in the 1st section; whereas it would be hard to bring a judgment within that definition. The words "present right" in the 40th section refer, not to the ability of the debtor to pay the debt, but to an ability on the part of the creditor to give a good discharge for the money, if received. The 42nd section contains an express exception of the case where a prior creditor is in possession; shewing that the legislature thought such a case would otherwise have been included within the limit of six years. The 24th section extends to Courts of Equity the bar which the 2nd section had created to legal rights; and the exception of the 25th only applies to cases which, but for that exception, would have been within that bar. We do not dispute the authority of the cases cited on the other side respecting a charge of debts being equivalent to a trust; but the bill here does not pray the recovery of lands or rent, but the recovery of an incumbrance,

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(a) 1 Yo. & Col. 434.

(b) 1 D. & W. 658.



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and that the debt due to plaintiff may be paid. The 25th section deals with suits for the recovery of "land or rent," and the 40th section with suits for the recovery of incumbrances;—distinct remedies are provided: and in *Doe v. Williams* (a), that distinction is taken by Littledale, J. The 42nd section expressly provides an exception to the limitation as to the amount of interest to be recovered by those who establish their title to the *corpus*; but in the sections which limit the time for recovering the *corpus* itself, there is no such exception. As to the argument that the jurisdiction of the Court is not taken away, the cases cited were decided before the passing of the act. The saving clause, providing for cases of express trust, in the 25th section, shews that the legislature intended to control Courts of Equity, and thought that, without that saving, the act would include all cases. The exception of cases of disabilities applies only where the principal is sought to be recovered. The proviso enabling Courts of Equity to refuse relief, extends to all cases; the proviso extending the cases in which relief is given, is confined to those expressly specified. In England, the Courts of Law have found it necessary to give a wider construction to the statute than they were at first disposed; *James v. Salter* (b); As to the case of *Kelly v. Kelly* (c), there had been a decree to carry the trusts of the will into execution before the act; and his Honor, in the concluding passage of his judgment (d), says, "It is to be remembered, "that the decree in this cause directs that the will of Hubert Kelly be "carried into execution; and that for such purpose his real estate has "been sold. The purchase-money is now in Court, and the present "proceeding is to enforce one of the trusts so decreed to be executed, "and for the purpose of which the sale has taken place." Of the two cases on which the Master of the Rolls rested his judgment in that case, one, *Jones v. Scott* (e), was decided before the passing of the act, and was reversed afterwards, upon appeal. The other, *Philippo v. Munnings* (f), was decided on the ground that it was a suit to make a trustee account for the breach of an express trust, and not a suit to raise the amount out of the testator's property. The fund had been allocated there to the payment of the legacy; and in *Kelly v. Kelly*, it had been allocated to the payment of the debts. Besides, the 40th section only refers to legacies charged on land, and not to legacies payable merely out of personalty. Now, a legacy is always a charge on land, by virtue of an express trust appearing on the face of the will; and this absurdity will follow, that where there is an implied trust, as in the case of a general charge of debts, the case is not within the operation of the statute; but where there is an

(a) 5 Ad. & El. 291.

(c) *Ante*.

(e) *Ante*.

(b) 3 Bing. N. C. 476.

(d) p. 232.

(f) *Ante*.

express trust created, as must be in every case of a legacy charged on land, the party will be barred at the end of twenty years; either that, or the Court must decide that a legacy charged on land is not within the 40th section. The case of *Fergus v. Gore* (a) is no authority upon the present act. The 8 G. 1 merely barred the proceeding upon foot of the debt; and the 2nd section gives a plea of payment in a suit for the recovery of a debt due by bill, bond, &c., referring to proceedings upon the judgment. This act is conversant with the title to land, and the limitation of actions and suits for the recovery of land, or money charged on land. The 40th section, after enumerating mortgage, judgment, and lien, adds, "or otherwise charged upon or payable out of any land;" expressly providing for a case like the present, and it refers expressly to proceedings in Equity. The general construction to be given to statutes of limitation is laid down in *Scott v. Jones* (b). As to the creditor's hands being tied up here, there is no foundation for that argument. He could not have been restrained from suing the executor, until a decree was obtained in Brennan's case; *Rush v. Heath* (c). And if he had been dissatisfied with the mode in which the funds were administered in the mortgage cause, he might have filed a bill himself for redemption. The only way in which he could have incurred a contempt of the Court was, by interfering with the receiver's possession. If he had proceeded either by *scire facias* or by bill, the pendency of Brennan's cause would have been no answer. Even if he wished to proceed by *elegit*, the Court would have given him leave to have done so, if the possession of the prior creditor had been fraudulent. Here, in the interval that has elapsed since the death of the testator, an ample personal property has been wasted. The executors' admission of the debt cannot affect us; *Putnam v. Bates* (d).

Mr. H. G. Hughes, in reply.—It is admitted on the other side, that if the jurisdiction exercised in the case of *Fergus v. Gore* has not been superseded or abridged by the recent statute, the present is a case calling for its exercise. It has been argued on the other side, that the 40th section of that act is the only one that can possibly refer to judgments. Now, assuming this to be so, that section refers to judgments simply, and to sums of money charged upon land. Now, the demand of the plaintiff here is not merely a judgment, or a sum of money charged upon land, but it is a judgment charged upon land, charged by the act of the debtor, to be carried into effect by the decree of this Court declaring it to be a charge; whereas the judgment spoken of in that section is the ordinary judgment, viewed simply as it stands between debtor

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(a) *Ante*.

(c) 4 Ves. 638.

(b) *Ante*.

(d) 3 Rus.

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and creditor, which is not *per se* a charge upon lands, but which requires the act of the party and the decree of the Court to make it a charge on lands.

The 8 *G. 1*, c. 4, required a proceeding upon the judgment, or payment of interest, to prevent the operation of the statute after twenty years. In *Maddock v. Bond* (a), it was decided that a promise to pay was not sufficient to prevent the operation of that act at law; but in *Barrington v. O'Brien* (b), Lord Manners said he doubted that that decision extended to Courts of Equity; because, he said, that holding out promises to pay the demand until the debt was barred by the statute, was a fraud: and he decreed relief, although forty years had elapsed. To a bill for the discovery of fraud, the statute of limitations cannot be pleaded; *Bicknell v. Gough* (c). Nor does length of time form any bar to relief against fraud; *Pickering v. Lord Stamford* (d); *Alden v. Gregory* (e). As between trustee and *cestui que trust*, the statute of limitations never applied: all the cases upon that subject are collected in *Maddock's Chancery Practice* (f). The filing of a bill by a creditor, on behalf of himself and others, prevents the statute from running against any creditors who come in under the decree—*Sterndale v. Hankinson* (g)—and the authority of that case is recognised and supported by the recent decision of the Exchequer in *O'Kelly v. Bodkin* (h). *Berrington v. Evans* was decided on special circumstances, and decided, not by Lord Lyndhurst, as alleged on the other side, but by Lord Abinger; and in that case the Chief Baron said, that he was not prepared to say whether, under other circumstances than those under which the case was presented to him, he should not have arrived at a different conclusion. The authority of Courts of Equity in cases of trust, to avoid the previous statutes of limitation, has been acknowledged; and the case of *Jones v. Scott* (i), which underwent considerable discussion before the Vice-Chancellor, the Chancellor, and the House of Lords, must have drawn the attention of the Legislature to the propriety of adopting some express enactment, if it was their intention to displace the jurisdiction which had theretofore been exercised by Courts of Equity. But instead of adopting any such course, the Legislature has not used any other words to bind or control Courts of Equity, save those used in the act of *G. 1*, on which the case of *Fergus v. Gore* was decided. The Registry Act, the 6 *Anne*, c. 2, binds Courts of Equity; and by the 5th section of that act, it is declared, that unregistered deeds

(a) Ir. Term Rep. 332.

(c) 3 Atk. 558.

(e) 2 Eden, 285.

(g) 1 Sim. 393.

(b) 1 B. & B. 178.

(d) 2 Ves. jun. 280.

(f) Vol. 1, p. 565, 3d ed.

(h) *Ante*.

(i) *Ante*.

shall be deemed fraudulent and void against registered deeds, and against creditors by judgment or recognisance ; and yet Courts of Equity have invariably displaced the priority given by the statute, where the conscience of the party claiming under the registered deed was affected by notice of an unregistered deed ; and Courts of Equity have given priority to judgments with respect to registered and unregistered deeds, according to the inherent jurisdiction of the Court, and contrary to the priority given, or affected to be given by the statute.

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The LORD CHANCELLOR on this day delivered the following judgment :—

Nov. 29.

This is a bill filed to take an account of what is due to the plaintiff on foot of a judgment obtained against Joseph Cruise, and which has been assigned to the plaintiff. To this bill two defences have been set up. The first is grounded upon the imputation thrown out against the means by which the plaintiff has acquired this right ; and the second rests upon the recent statute of limitations.

I think it important to the decision of this case to consider the terms of the will of Joseph Cruise, the consor of this judgment, as in my opinion they afford ground for deciding this case without entering into the question of the construction of the statute of limitations, which has been so much discussed in the argument. He, by his will dated the 13th of July 1816, directs that a particular chattel should be applied in satisfaction of a debt which he specifies, but which it is unnecessary to mention particularly here, and desires his executors to call in all debts due to him, and all other property of his, and apply the produce in discharge of his debts. He devises his estates, both freehold and chattel to his wife Eleanor, his three sons and two daughters, to be divided between them after payment of his debts, which he had in a previous part of his will directed to be paid, so that it is not merely a devise subject to debts, nor a devise charged with debts—but he directs the debts to be paid in the first instance. It is not merely the ordinary case of a party devising his property subject to his debts, but the testator here gives precise and special directions with respect to the payment of them, and devises in such a form, as to impose upon the devisees the obligation of making the actual payment of them before they can derive any benefit from his property. It has been admitted by the counsel for the defendants, that this is an express trust for the payment of debts within the meaning of the authorities upon the subject, but they have contended that the recent statute of limitations creates a bar.

This makes it material to consider the circumstances under which the bill is filed. The testator, J. Cruise, was seized of the equity of redemption of lands, which were the subject of a prior mortgage to a Mrs. Martley ; and on the 3rd October 1814, he executed his bond, with warrant of attorney for confessing judgment, in the penal sum of £200,

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conditioned for the payment of £100, with interest, in four years from the date. He died in 1816, having by his will appointed three executors, of these Thomas Brennan alone acted; and shortly after the death of the testator he filed a bill against the mortgagee, against his two co-executors, who declined to act, and against the six devisees. Two of the devisees appeared in the cause, and a commission of rebellion issued against those who had not—so that they were all before the Court either actually, by appearing, or constructively, by permitting a commission of rebellion to issue against them. Shortly after the filing of the bill, a consent was entered into that a receiver should be appointed over the real and personal property of the testator, which was signed by the two devisees who had appeared; and an order was made, founded upon that consent, on the 22nd of July 1816, that a receiver should be appointed over the real estate, and that the same person should proceed in the name of the executors, to call in the outstanding personalty, and to this order the only acting executor was a party. In pursuance of this order the receiver was appointed, and on the 10th of August 1816, the usual order was obtained that the tenants on the testator's estate should pay the rents to him.

Matters continued in this state, without any further step being taken, until the 17th of November 1816, when the mortgagee filed her bill for a foreclosure of the mortgage, and an application was made by her for the extension of the receiver to the cause. That application was at first postponed, at the desire of the executor and Joseph Cruise, but it subsequently came on to be heard; and the receiver was extended to the mortgagee's suit; and he has continued in receipt of the rents until the mortgaged premises were sold under the decree afterwards pronounced. The mortgage cause proceeded, and in 1838 the usual decree for a sale was pronounced. Under that decree a sale has been had, the mortgage has been paid, and the surplus of the produce of that sale, with the exception of £800 that has been paid to a prior creditor, is still in Court. So that we have the cause continuing up to the pronouncing of the decree of 1838, and we have the surplus of the fund realised in that cause still in Court, out of which the plaintiff seeks to be paid the amount of his judgment.

During the entire of this period, from the extension of the receiver until the sale, the estate was in the hands of a prior incumbrancer, and the judgment creditor could not take any proceeding at law, because the consor of the judgment at the time when it was acknowledged, was entitled to an equity of redemption only, and he could not have proceeded in equity without an application for the leave of this Court; and if he had disturbed the possession of the receiver, he would have incurred a contempt of the Court. It is said that he might have made such an application; but even if he had done so, he could have reaped no fruit by it until the prior mortgagee was paid, and a fund realised which he could render available for the payment of his judgment; so that here

we have the person whom the plaintiff represents, placed in such a situation, that he cannot take any step for compelling payment of his debt, without incurring costs fruitlessly.

In such a situation, with his hands thus tied up, it was a natural thing for him to try and procure something for his debt by assigning it to any one willing to purchase, and he accordingly assigns to the plaintiff. In that I cannot see any thing objectionable ; he could not make the judgment available against the estate of his debtor, and he assigns it consequently for less than the amount due. It is said that the plaintiff taking an assignment under such circumstances is guilty of champerty, or at least, that having purchased this judgment for a small sum, he is not in the same situation as the original owner of it. I do not know what injustice there is in a party's buying up a judgment for a smaller sum than the amount due, and claiming the entire from the estate of the debtor. There is no complaint made by the assignor, that he has been imposed on ; and in the absence of any such complaint on his part, I am called on to say, that there is such demerit in the party purchasing this debt, as to deprive him of all right to the assistance of a Court of Equity in enforcing payment of it. In any such argument I could not concur, and I consider the case as if the original conusee were the plaintiff.

By these observations, the first objection, as to the mode in which the plaintiff procured the assignment, is disposed of. But besides that objection, serious questions have arisen which have been fully and ably argued, and which are undoubtedly entitled to more consideration.

The defence which has been principally relied on is the statute of limitations. A great deal of argument has been used to show that this case depends solely on the 40th section of the statute, and that that section must be taken by itself, and cannot be taken in connection with, or governed by the 25th. Now I am not prepared to say that I concur in that argument, or to decide that the 25th section does not qualify the provisions of the 40th ; the view which I take of this case renders it unnecessary for me to make any decision upon it in the present instance. The 40th section, it must be admitted, standing by itself, creates an express bar, unless some proceeding be taken within twenty years after the right of the party has accrued. Supposing that it is so, and that that section is not to be construed with reference to the 25th, it is not necessary for me in the present case to decide what is the exact meaning of the words "present right," which are used in that section—whether those words mean such a right as the party could render effectual ; nor am I called on to decide whether the disability to proceed effectually, either at Law or in Equity, prevents the right from being considered as having accrued, within the meaning of that section. This is not the case of a prior creditor having a mere incumbrance on the estate of the

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debtor, leaving the estate itself in him, this is the case of a mortgage affecting the entire, and leaving only an equity of redemption in the debtor. But whether the 40th section is to receive such a construction, or whether it is to be construed with reference to the 25th section, I beg it right also to guard myself against the supposition, that in *Burne v. Robinson* I decided that the 40th section is not governed by the 25th. In that case I decided no such thing, the only thing I decided, or intended to decide, was, that that case was not within the 25th section. There the right to the principal sum was not in dispute; that had been established, and the only question was as to the length of time for which the plaintiff was to have an account of interest; and I decided that there was no exception in the statute, by which the case could be taken out of the provisions of the 42nd section. Here it has been argued, that even if the plaintiff should succeed in establishing his right to the principal sum, he cannot recover more than six years' interest, and the case of *Burne v. Robinson* has been relied on for that purpose; but that case is not like it, for the 42nd section contains an express provision for the case of a prior creditor in possession, and such a case is excepted out of the general rule, and here there has been a prior mortgagee in receipt of the rents until the sale under the decree, so that on that part of the case I should feel no difficulty. It is not, however, necessary to decide it in the present stage of the cause, nor do I mean to pronounce any decision upon it. The only question at present is the right of the plaintiff to the principal; and in deciding that, it becomes unnecessary, from the view which I take of the case, to pronounce any judicial opinion as to the construction of the statute. I am relieved from that necessity by the decisions which have been made both before and since the passing of the statute. The case of *Fergus v. Gore* appears to me to decide the present question. That case is a direct decision, that when there is an express trust for the payment of debts, the right of the creditor to take the benefit of that trust is not affected by the provisions of the 8 G. 1, and we have, therefore, the high authority of Lord Redesdale for saying, that even if by the 40th section the right of the creditor to proceed, either at law or in equity, for the recovery of his debt, were expressly taken away, his right to take the benefit of an express trust would still remain.

The effect of that decision has, I think, been misunderstood in the course of the argument: it has been represented as proceeding on the ground that the statute merely barred the remedy for the debt, and left the equitable right unaffected. But that is a mistake, the 8 G. 1, was as much binding on Courts of Equity in its terms as the present statute of limitations. So that in that case we have it laid down, that the ordinary jurisdiction of Courts of Equity is not taken away by a statute limiting the time

within which a party should proceed for the recovery of his debt, where an express trust has been created for the payment of it. Now, here there is an express trust for the payment of debts, not resting merely on those cases which decide that a devise of land subject to the payment of debts, or a devise charged with the payment of debts, creates an express trust in the consideration of a Court of Equity—but here there is an express devise upon the condition of paying the debts, to parties who are to take no benefit from that devise until the debts are paid, and there is a direction to have the property applied in payment of those debts in the first instance. Under these circumstances, I feel myself bound by the authority of Lord Redesdale, unless a distinction can be drawn between the 8 G. 1, and the recent statute. Such a distinction I do not find, and I do not feel myself bound to look for one; for I have the express authority of the Master of the Rolls in *Kelly v. Kelly* for the view which I take of this case. In that case of *Kelly v. Kelly*, although there were other circumstances, yet his Honor expressly founds his judgment upon the principle, that the ordinary jurisdiction of Courts of Equity to prevent the acts of the Court itself, or of third persons, from affecting the rights of others, is not taken away by the statute. That position does not rest merely on his own authority, but on the authority of the cases cited by him in the course of his judgment, and which are, in my opinion, conclusive upon the present question. The first of these is *Jones v. Scott*: it is said that case has been overturned on appeal; but in my opinion the authority of it upon the present question, is much higher than if the case had never been brought before the House of Lords. The Lords reversed Lord Brougham's decision, so far as it went to decide that a trust of personalty for the payment of debts was not affected by the statute of limitations; but in doing so they expressly recognise the principle that such a trust, so far as regards the real estate, is not affected by the statute; and so far from the authority of that case being weakened, so far as it bears upon the present question, by the reversal of Lord Brougham's decision, it has, in my opinion, received an additional sanction. Then comes *Philippo v. Munnings*, and there the provisions of the statute were relied on as a bar to the plaintiff's equity, but Lord Cottenham considered the case so clear, that he declined to hear the counsel for the plaintiff in reply.

A great deal of argument has been used, to shew that those decisions do not govern the present case, yet I cannot think that any thing is left for me but to follow them, unless I was clearly satisfied that they were wrong; and I certainly would hesitate long before I would set up my own opinion against the authorities I have referred to. The ground upon which they proceed is this,—that the inherent jurisdiction of Courts of Equity to prevent the rights of a party from being prejudiced by their own acts, or by the acts of the persons against whom those rights are

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sought to be enforced, is not taken away by the statute. If that jurisdiction then be not taken away, can there be a clearer case for its exercise than the present, in which the property of the debtor has been administered by the Court, and there is now a fund in bank under the control of the Court itself. Here the judgment creditor is prevented, by the act of the executor in placing the property of the testator under the administration of the Court, from receiving payment of his debt out of that which was the natural fund for the purpose, the personal property. The property was thereby taken out of the control of the executors, a receiver is then appointed, with the consent of the devisees, to collect the personal property; the fund is by these means taken into the hands of the Court, and is no longer vested in the executors. Then the mortgagee files her bill of foreclosure; an order is made in that cause, upon the consent of all parties, by which the receiver is extended to that cause, and he is directed to apply the rents in payment of the interest on the mortgage under the control of the Court, and he continues in possession until the estate is sold. In such a case it is impossible for the Court to refuse relief to the plaintiff, without abdicating its functions, and admitting that it is deprived of all power to prevent parties from being injured by its acts.

I have carefully considered the case with respect to the decision which I should make upon the question of the costs of the suit; and as the law of the Court entrusts me with a discretion upon the subject, I do not think that there is any thing in the case to warrant me, in the sound exercise of that discretion, refusing those costs to the plaintiff.

Executors of JOHN MURTAGH, deceased, JOHN TISDALL and others . . .	<i>Plaintiffs.</i> <i>Defendants.</i>	1840. <i>Rolls.</i>
WILLIAM WHITE, . . . JOHN TISDALL and others, . . .	<i>Plaintiff.</i> <i>Defendants.</i>	
WILLIAM CUFFE, . . . JOHN TISDALL and others, . . .	<i>Plaintiff.</i> <i>Defendants.</i>	
ARTHUR R. C. NEWBURGH and WILLIAM PARSONS, . . .	<i>Plaintiffs.</i>	
JOHN TISDALL, Executors of MURTAGH, WILLIAM WHITE, WILLIAM CUFFE, and others . . .	<i>Defendants.</i>	
JEROME TISDALL, . . .	<i>Plaintiff.</i>	
JOHN TISDALL, JOHN GROGAN, Executors of MURTAGH, WILLIAM WHITE, WIL- LIAM CUFFE, and others, . . .	<i>Defendants.</i>	

(*In the Rolls.*)

Nov. 4, 5, 13.

AFTER the order of the 30th November 1839, in these causes (*ante*, vol. 2, p. 53), whereby it was ordered, that "the residue of the funds standing to the credit of the first four causes should be transferred to the credit of all the causes," it was, upon the motion of Jerome

An annuitant by deed unregistered (plaintiff in 5th cause) filed a bill for arrears, making sub-

sequent encumbrancers by deeds of annuity and mortgage, duly registered (plaintiff in second and third causes), and a creditor by judgment intermediate between the unregistered and registered deeds (plaintiff in first cause) parties defendant. The subsequent annuitant and mortgagee answered, insisting on their priority to the plaintiff, by reason of the registration of their deeds; and the decree to account declared that their priority was admitted by the plaintiff. The judgment creditor, to whom a large sum was due, did not seek relief in this cause, and allowed the bill to be taken *pro confesso* against him. Before any demands were proved or report made, the plaintiff obtained assignments of the registered annuity and mortgage; and the Master reported that he did not find any thing due upon them, the same having been assigned after decree to the plaintiff, who declined to prove any demand under them, being willing that they should remain charged upon the unsold lands. There was accordingly a final decree for the sum due on the unregistered annuity without regard to the registered encumbrances.

Another creditor (plaintiff in fourth cause) by judgment, also intervening between the unregistered and registered deeds, who was not a party in the above suit, filed his bill, and in his cause had a report of the sum due to him.—The fund in Court was realised in this latter cause, but was afterwards transferred to the credit of all the causes, and its amount was considerably less than the sum due upon the unregistered annuity.

The judgment creditors now insisted that their judgments were entitled in priority to the unregistered prior deed, by reason of the conflict and admitted priority of the registered deeds subsequent to the judgments:—*Held*—that the judgment creditor who was party to the fifth cause, but allowed the bill to be taken *pro confesso* against him and did not prove his demand in that cause, was bound by the final decree, and could not be heard to insist on his priority. *Held also*, that by conflict of unregistered and registered deeds, judgments intermediate do not obtain absolute priority to the unregistered deed, until it is absolutely postponed to the registered deed.

Semble, where the decree to account declared that the plaintiff, who was entitled under an unregistered deed of the 10th July 1808, admitted the priority of A. and B., who were entitled under registered deeds of the year 1827, and then directed an account of encumbrances prior to the deed of 10th July 1808,—judgment debts prior to the registered deeds of 1827, might be proved under the decree: and, *Semble*, A. and B. having assigned to the plaintiff after the decree to account, and no demand being proved nor any thing found due upon the registered deeds, the unregistered deed recovered its original priority to the intermediate judgments, at least as to all creditors not parties.

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Tisdall, plaintiff in the fifth cause, on the 13th of December 1839, referred to the Master, to inquire and report the relative priority of the demands of the several parties in the said several causes, and the sums in bank applicable to pay, &c.

Under the foregoing order of reference, the Master, by his report, filed the 18th of June last—after finding specially the several facts stated at length in the case, *ante*, vol. 2, pp. 41, 45 (*a*), and also that on the 26th of November 1839, there was a final decree in the fifth cause, confirming the report of the 11th of November 1839; and that the plaintiffs in the first cause, being also defendants in the third and fifth causes, had lately filed a charge, claiming a large sum for debt and costs;—and after further finding that the plaintiff in the fifth cause, whose demand was under “the earliest and *unregistered* deed,” having

(*a*) The statement, *ante*, vol. 2, p. 41, of the effect of the annuity deed of 10th July 1808, to Sir J. Fitzpatrick, was taken literally from a brief used in the case, and afterwards kindly furnished to the Reporter, who supposed its description of the deed in question was an accurate transcript from the instrument itself; but it appears by the Master's report, that the statement should have been to the following effect:—

‘By deed of 10th July 1808, the defendant John Tisdall granted to Sir Jeremiah Fitzpatrick, his heirs and assigns, an annuity or rent-charge of £400 late currency, issuing out of the said lands, &c., for the life of the said John Tisdall; and it was thereby agreed that the said Sir J. F. and his assigns should take the said annuity to his and their own use for and during the joint lives of the said Sir J. F. and John Tisdall; and in case the said John Tisdall should survive the said Sir J. F., then £200 yearly, being one-half of the said annuity accruing from and after Sir J. F.'s death, should be, &c., to the use of such child or children of Lucinda Tisdall, daughter of the said Sir J. F., and in such shares, if appointed to more than one, as the said Sir J. F. by any deed or instrument in writing attested, &c. or by his last will might appoint; the other moiety of the said annuity to such uses as the said John Tisdall might think fit.’—The Master, by his report, found that a memorial of this deed was executed, which stated that in consideration of, &c., the said John Tisdall granted an annuity of £400 out of the lands therein mentioned, *To hold* to the said Sir J. F. and his assigns during the joint lives of the said John Tisdall and Sir J. F., and to be paid quarterly.

The precise dates of the judgments obtained by Newburgh and Parsons, and by Murtagh, were not material in the former case, nor are they in the present,—the important fact being, that they were judgments intermediate between the unregistered and registered deeds; however, it is as well, for the sake of accuracy, to observe that those dates, as stated in the Master's report, are as follow:—Newburgh's and Parsons' judgment, Easter 1822; Murtagh's judgment, Michaelmas 1822; Cuffe's mortgage, 7th February 1827; White's annuity deed, 21st July 1827.—The Master has also reported an annuity to John Grogan, a defendant in Tisdall's cause, by deed bearing date the 9th December 1819, and duly registered; but there were no arrears upon it, and as no question arose upon the admission of its priority, there being no intervening judgment between it and the unregistered deed, it has been deemed unnecessary to encumber the case with any mention of it.—In all other respects, the findings of the Master, so far as the question in the present case is concerned, and the statement *ante*, vol. 2, pp. 41, 45, exactly agree.

obtained assignments of the subsequent registered deeds, had not filed any charge in respect of them or any of them, and by his counsel, declared that he did not intend to file any charge upon the reference, or to seek any payment thereunder on foot of the said registered deeds;—then reported, “the said unregistered deed as the first charge upon the fund now about to be distributed, and prior to all the judgments aforesaid, by reason of its prior date.” The report further stated that the Master had so reported, because there was no subsisting conflict before him between the registered and unregistered deeds; “but,” the Master added, “as I conceive that in so doing, under all the circumstances, I go a step further than any decision has hitherto gone, I submit the same, as matter of difficulty, and fit for the consideration of your Lordship.”

The residue of cash and stock remaining after the payment of the costs, &c., was little more than £1000; and the Master reported that this (subject to the question submitted to the Court) was applicable, as far as it would extend, in discharge of the demand of the plaintiff in the fifth cause.

There was now an application on behalf of Jerome Tisdall, the plaintiff in the fifth cause, that the question submitted by the Master for the consideration of the Court, should be ruled in his favour, and that the report should be confirmed, and the fund allocated accordingly.

Mr. Warren, Q. C., Mr. Keatinge, Q. C., and Mr. J. H. Blake, Q. C., for Jerome Tisdall.

The question which the Master has submitted for the consideration of the Court arises upon the following facts:—Our demand, which he has reported as the first charge, is for arrears of an annuity under a deed executed by the defendant John Tisdall so long ago as the 10th of July 1808, which, though registered, was, it is said, registered defectively; and, for the purposes of the present motion, it is to be considered as an unregistered deed (a). The plaintiffs in the first and fourth causes, by whom the present application will be resisted, are judgment creditors of the defendant John Tisdall, by judgments obtained against him as of Easter and Michaelmas Terms, in the year 1822. They will contend that our prior deed being unregistered, should be postponed to their judgments; because, in the year 1827, the defendant Tisdall executed a mortgage of the lands to William Cuffe, and a deed of annuity to William White (the plaintiffs in the second and third causes), both of which were duly registered; and White and Cuffe, being defendants in our cause, by their answers, alleged that the deed under which we are entitled was not duly registered, and therefore claimed priority to us in virtue of the registration of their deeds. We did not think it necessary

(a) See note at the conclusion of this case.

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to litigate the question with them ; and by the decree to account in our cause, it was declared that we admitted their priority ; but before any demand was proved, or report made under the decree, we obtained from them assignments of all their right, title, and interest under the subsequent deeds of mortgage and annuity, and the Master reported specially that they had been assigned to us, and that he did not find anything due upon them, as we declined to prove any demand under them, being willing that they should remain charges upon the lands. We therefore had a final decree for the arrear of the prior annuity, without regard to the registered deeds subsequent to the judgments. The report, now before the Court, has a similar finding ; and thus it appears that the prior unregistered deed never has been postponed to the subsequent registered deeds ;—that there neither is nor can be any conflict between the demands upon them ; as all of them are now vested in Jerome Tisdall, who will of course take care not to defeat his own prior rights. But the judgment creditors will contend, that by the answer of Cuffe and White in our cause, there *was* a conflict between the unregistered and registered deeds ; and although, so far as the deeds were concerned, that conflict had no effect, still the intervening judgments thereby obtained priority to the unregistered deed. They insist that such is the law, upon the due construction of the fifth section of the Registry Act. (a).

(a) 6 Anne, c. 2. The following are the sections referred to in the course of the argument :—

Preamble, sec. 1. “ For securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements and hereditaments, which have been frequently practised in this kingdom, especially by Papists, to the great prejudice of the Protestant interest thereof, and for settling and establishing a certain method, with proper rules and directions for registering a memorial of all deeds and conveyances, which from and after the 25th day of March, in the year of our Lord 1708, shall be made and executed, and of all wills and devises in writing made, or to be made, and published, where the devisor or testatrix shall die after the said 25th day of March 1708, for or concerning any honours, manors, lands, tenements or hereditaments in this kingdom.” (Public office for registering the memorials of deeds and conveyances, wills and devises, to be established and kept in the city of Dublin.)

Sec. 3. “ And be it further enacted by the authority aforesaid, that a memorial of all deeds and conveyances which from and after the 25th day of March 1708, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 25th of March 1708, for or concerning, and whereby any honours, manors, lands, tenements or hereditaments within this kingdom may be any ways affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter directed.”

Sec. 4. “ And be it further enacted, that every such deed or conveyance, a memorial whereof shall be duly registered according to the rules and directions in this act prescribed, shall, from and after the said 25th of March 1708, be deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial for and concerning the honours, manors, lands, tenements and hereditaments in such a deed or conveyance mentioned or contained, according to the

In *Heydon's case* (a), it was resolved, "That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—First, what was the common law before the making of the act:—Second, what was the mischief and defect for which the common law did not provide:—Third, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth:—and Fourth, the true reason and remedy." Let the statute in question be construed according to those rules. How stood the common law before the making of the act? There is no doubt, that a subsequent incumbrance could not avoid a prior charge—the prior deed had the prior right. Again, what was the mischief and defect for which the common law did not provide? We have the answer to that question in the preamble of the act itself, which is "*For securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements, and hereditaments, which have been frequently practised in this kingdom, especially by Papists, to the great prejudice of the Protestant interest thereof,*" &c. Thus it appears that the mischief and defect for which the common law did not provide, and which the statute was meant to cure, was this, that, as at common law the prior deed had the prior right, it happened by secret conveyances, and fraudulent gifts, purchasers of lands, tenements, and hereditaments were insecure. The third question is—What is the remedy appointed? By the first section of this act, after shewing in the preamble the mischief and defect for which the common law did not provide, it is enacted, "that one public office for registering memorials of deeds and conveyances, wills and devises, shall be established and kept in the city of Dublin." The second section is as to the office of Register. By the third section, it is enacted that a memorial of all deeds and con-

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(a) 3 Co. 7.

"right, title and interest of the person or persons so conveying such honours, manors, lands, tenements and hereditaments, against all and every other deed, conveyance, or disposition of the honours, manors, lands, tenements, and hereditaments, or any part thereof comprised or contained in any such memorial as aforesaid."

Sec. 5. "And be it further enacted, that every deed or conveyance not registered, which shall be made and executed from and after the 25th of March 1708, of all or any of the honours, manors, lands, tenements or hereditaments, comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors by judgment, recognizance, statute merchant, or of the staple, confessed, acknowledged or entered into from and after the 25th of March aforesaid, as for or concerning any of the honours, manors, lands, tenements or hereditaments contained or expressed in such memorial registered as aforesaid."

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veyances, which, from and after the 25th of March 1708, shall be made and executed, and of all wills and devises in writing, where the devisor or testatrix shall die after the said 25th of March, “for, or concerning, “and whereby any honours, manors, lands, tenements or hereditaments “within this kingdom may be any ways affected, *may, at the election of “the party or parties concerned,* be registered in such manner as is here- “inafter directed.” By the fourth section,—every such deed or convey- ance, a memorial whereof shall be duly registered, shall, after the 25th of March 1708, be good and effectual according to the right of the per- son conveying, and according to the priority of time of registering, against “all and every other deed, conveyance, or disposition of the honours, ma- nors, lands, tenements, or hereditaments, or any part thereof comprised “or contained in any such memorial as aforesaid.” Thus, it appears that as the insecurity of purchasers by secret conveyances and fraudulent gifts was the mischief and defect which the statute was intended to cure, so the remedy which the statute gives is confined to that mischief and defect. A public office for the registration of wills and conveyances is established, in which parties at their election may register; their deeds will not be null and void, if they do not register, but the consequence will be, that a subsequent conveyance, if registered, will be preferred. In the first four sections, the whole purpose of the statute is developed. It is confined exclusively to deeds and purchasers; but in order to give full effect to the fourth section, it became incidentally necessary to pro- vide for the case where judgments intervened between the unregistered and registered deeds; for there, the registered deed could not be pre- ferred, unless the unregistered deed should be postponed not only to the registered deed, but also to the intervening judgments. Ac- cordingly, by the fifth section (the only one in the entire statute in which judgment creditors are once mentioned or alluded to), it is enacted, that the registered deed shall be deemed fraudulent and void “not “only against such a deed or conveyance registered as aforesaid, but “likewise against all and every creditor and creditors by judgment, “recognizance, statute merchant or of the staple, confessed, acknow- “ledged, or entered into from and after the 25th day of March afore- “said, *as for and concerning all or any of the honours, manors (&c.), con- “tained or expressed in such memorial registered as aforesaid.*” It is clear upon authority, and plain from the concluding words of the section itself, it was not thereby intended that in every case a judgment should be preferred to a prior unregistered deed; but only that the fourth section should not be rendered inoperative by judgments which intervened between the unregistered and registered deeds; as in such case, the registered deed taking priority should carry up the inter- mediate judgments, and the unregistered deed be postponed to all.

It will not, and cannot be denied, that there must be a *conflict* between

the unregistered and registered deeds, in order to bring this section into operation for the benefit of the intermediate judgments; but it will be contended here, that where the demand under the registered deed has once claimed priority to that under the unregistered—thus bringing the deeds in conflict—the intermediate judgments thereby obtain an absolute priority to the unregistered deed; although, as in the present case, the relative situation of the deeds themselves, and of the rights under them, remains unchanged. We say that such is not the true interpretation of the fifth section, nor consistent with the several decisions respecting it, which are now regarded by all the Courts in this country as settled law. But before examining the decisions, let us fall back for a moment upon the rules in *Heydon's case*, and consider “the true reason and remedy” of this statute:—We have seen that the insecurity of purchasers under the common law, by reason of secret conveyances and fraudulent gifts of a date prior to the purchase, was “the mischief and defect” which the statute was intended to cure;—that the remedy, viz., the registry of conveyances and wills, and the preference of such as are registered, has regard to that mischief and defect, exclusively;—that neither in the preamble, nor in the first, third, or fourth sections, which declare the mischief and provide the remedy, are judgment creditors once mentioned or alluded to;—that neither “the true reason” nor “the remedy” of the statute has any thing to do with judgments, which are mentioned only incidentally in the fifth section, in order to provide for a case where their existence might render the enactment of the fourth section inoperative. Therefore, having regard to “the true reason and remedy,” we conclude that, upon the due construction of the fifth section, a prior unregistered deed does not lose its priority to judgments intermediate between it and a registered deed, unless that loss becomes unavoidable by its postponement to the registered deed;—and consequently, that, in the present case, as the unregistered has not been postponed to the registered deed, neither shall it be postponed to the judgments.

The following decisions were then cited and relied upon:—*La Touche v. Lord Dunsany* (a); *Lawless v. Kenny* (b); *Sparrow v. Cooper* (c).

Mr. *Monahan*, Q. C., and Mr. *J. J. Murphy*, for the plaintiffs in the first cause.—We were defendants in *Jerome Tisdall's* cause, in which the Court did, upon the decree to account, that which, in *Sparrow v. Cooper*, was done upon the final decree, namely, declare the priority of certain parties. In *Sparrow v. Cooper*, the point of decision (in as-

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(a) 1 Sch. & Lef. 160–1.

(b) Hud. & Bro. 385, 390.

(c) 1 Jones, 75, 77.

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much as all that was said about the Registry Act was extra-judicial), was, that the question of priority was concluded by the decree. It is a well settled principle, that where priorities have been declared by the decree, they cannot afterwards be altered by the acts of the parties: *Wortley v. Birkhead* (a); *Lord Bristol v. Hungerford and others* (b); *Ex parte Knott* (c); *Lord Pomfret v. Lord Windsor* (d). Therefore, relying upon the decision in *Sparrow v. Cooper*, and the other cases just mentioned, we submit that the priority established by the decree to account in Tisdall's cause, was not avoided by the subsequent assignment; and consequently, that our judgment being prior to the registered deeds, must be paid off in priority to the demand under the unregistered one.

[MASTER OF THE ROLLS. I do not think that the executors of Murtagh are entitled to be heard upon this motion, although I am very glad to have had the assistance of their counsel. I think they are concluded by the final decree in Tisdall's cause to which they were parties. First, they allow the bill to be taken *pro confesso*; and then, although according to the argument of their counsel, they would have been entitled to prove their demand under the decree to account—as the account of “incumbrances prior to deed of 10th July 1808” could scarcely, after the declaration of the priority of the subsequent registered mortgage and annuity of Cuffe and White, have meant *prior to the date of the deed*, but prior to the existing charge under it—yet they did not attempt to prove any demand under the decree, but suffered the report to be made up without finding any thing due to them. I do not say that they should now have been entitled to priority even if they had proved their demands; but as they did not, and suffered the plaintiff to obtain a final decree in favour of the unregistered deed, they are bound by it. The Messrs. Newburgh and Parsons, who were not parties to Tisdall's cause, are, I think, the only persons entitled to resist the present application.]

Mr. Collins, Q.C., and Mr. Martley, for Newburgh and Parsons.—Ours is the earliest judgment, and our case differs from Murtagh's not only in this, that we were not parties in Tisdall's cause, but in other very important particulars also. It is necessary that we should advert shortly to the history of the fund now in question, as it appears upon the findings of the Master's report:—prior to the year 1831, Cuffe and White instituted their suits, the one to foreclose his registered mortgage, and the other for the arrears of his registered annuity. A receiver, previously appointed in the cause of Murtagh (who was the first to file his bill), was extended to the causes of Cuffe and White;

(a) 2 Ves. sen. 571.

(c) 11 Ves. 619.

(b) 2 Vern. 521.

(d) 2 Ves. sen. 485.

and, thereupon, Murtagh, White, and Cuffe entered into a consent that the rents received, and to be received, should be divided in certain proportions between them on account of their demands; and that consent was made a rule of Court on the 7th of December 1833. In the year 1831, Tisdall filed his bill for arrears of his unregistered annuity, making Murtagh, White, and Cuffe, parties defendant; and White and Cuffe answered, insisting on their priority by virtue of the Registry Act. The conflict which thus arose between the registered and unregistered deeds, continued for a series of years down to the date of the assignment from White and Cuffe to Tisdall. While at its height, in the year 1835, we (*i. e.* Newburgh and Parsons), having issued an *edict* upon our judgment, filed our bill making Murtagh, White, and Cuffe, parties; and our demand being entitled in priority to theirs, we obtained an order, on the 21st of June 1836, extending the receiver in their cause to ours, and staying all further payments under the consent order of 7th December 1833. The fund now in Court is the amount of the rents received and brought in before the 1st of May 1838, by means of the order so obtained by us. On the 21st of June, 1838, it was, upon the consent of the several parties concerned, referred to the Master to take an account of the sums due to Murtagh, White, Cuffe, and to us; and to report as to the relative priority of the demands. Under that order White and Cuffe filed charges, claiming large sums on foot of their registered mortgage and annuity, and insisting on their priority to Jerome Tisdall. After the filing of those charges, there was a decree to account in Tisdall's cause on the 21st of November 1838, whereby it was declared that the plaintiff admitted the priority of White and Cuffe.

Upon those facts, every one of which is specially found by the report, it appears indisputably, that there has been a protracted conflict between the unregistered and registered deeds, which continued until the priority of the registered deeds was established by a decree of this Court; and although not parties to that decree, we are entitled to insist upon it in so far as it brought the Registry Act into operation. We therefore rely upon the argument already addressed to the Court by the counsel of the executors of Murtagh, and the several authorities cited by them. After the priorities were declared by the decree, the subsequent dealings of the parties could not alter them. It cannot be denied that, according to the strict letter of the statute, we are entitled to priority, and we are not less entitled by its spirit and meaning. We admit that the primary object of the act was for securing purchasers, but we say that it had several other objects: for example, the establishment of a general registry; the prevention of forgery; the prevention of a man's obtaining credit on the false appearance of possessing an estate which by a secret conveyance had become the property of another; and we say that the true reason of

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the act extends to judgment creditors. We admit that, according to late decisions, judgments gain no benefit, unless they are intermediate between conflicting unregistered and registered deeds; but that is the case here, and the priority of the registered deed has been established by a decree. The argument upon the other side does nothing, unless it goes to the extreme of contending, that the fifth section of the Registry Act does not in any case operate in favour of judgment creditors, unless effect is given to the established priority of the subsequent registered deed: so that, in the present case, if the decree to account had been followed by a report finding the sums due to White and Cuffe upon their registered deeds; and that report had been followed by a final decree ordering payment to White and Cuffe in priority to Tisdall; and then, White and Cuffe, in collusion with Tisdall for the purpose of defeating the judgment creditors, assigned to him, he might, by forbearing his demand upon the registered deed, restore his unregistered demand to its original priority and defeat the judgment creditors. The statement of the proposition in detail renders it absurd.

The general inconvenience of such a principle could not, perhaps, be better illustrated than by the very case now before the Court. As already mentioned, Tisdall did not obtain his decree to account until the 21st of November 1838, and the receiver was not extended to his cause until the 10th of December 1838. The fund in question is the amount of rents stayed by the order obtained by us, from going to the very persons who were declared by the decree in Tisdall's cause to be entitled in priority to him; it was realised in the very years during which the conflict between the unregistered and registered deeds was proceeding most determinedly; and it had been brought in several months before there was either a decree or receiver in Tisdall's cause. Our judgment, and Murtagh's, upon which there were large sums due for debt and costs, were prior the to demands of Cuffe and White; who could therefore have had little chance of receiving any thing at least for some years; and there was nothing to look to except the debtor's life estate. Of course, they were easily persuaded; and after a decree establishing their priority, Tisdall obtains an assignment from them, and says there is no conflict, and that his unregistered deed is prior to our judgments. We need not now repeat the case which we made a year ago, when he came to have the fund—realised by our diligence and brought in before he had either a decree or receiver—extended to his cause; but we submit that, on the present occasion, both the law and justice of the case are clearly in our favour.

Mr. J. H. Blake, Q. C., in reply.—I shall now disencumber the question of the several topics which, I think, have already been disposed of in the course of this discussion. In the first place, Murtagh's judgment is

out of the way, as he was clearly bound by the final decree in our cause to which he was a party; and I may assume that a judgment is not to be preferred to a prior unregistered deed, unless there be subsequent to the judgment a registered deed in conflict with the unregistered.

[MASTER OF THE ROLLS. The question which most presses my mind is this,—How long may the conflict between the registered and unregistered deeds continue, and when does it cease, without giving priority to the judgment creditors?]

I admit fully, that if White and Cuffe had proved their demands in our cause, and the report of the sums due to them had been followed by a final decree ordering payment to them in priority to us, the intervening judgment creditors not bound by the decree would have been absolutely entitled to priority: for in such case, just as in *Sparrow v. Cooper*, there would have been an ascertained demand, and its priority declared. But what is the effect of the declaration in the decree to account in our cause, of which so much has been said? It is admitted that a judgment is not to be preferred, unless there be a subsequent registered deed; it is further admitted, that the mere existence of a subsequent registered deed has no effect, unless there be a conflict. Here there is a declaration in the decree to account open to two observations: first,—it is not a judicial determination, but the statement of a naked fact, namely, that we thought proper to waive our priority in favour of certain defendants;—for what reason, does not appear by the decree. Again, even supposing that the declaration here was an express decision upon the question of priority between the parties, it was plainly conditional—if any thing was due; and so the parties were sent to an account to ascertain whether any thing was due; and the Master reports that the registered deeds have been withdrawn, and that he does not find any thing due upon them. What then becomes of the declaration in the decree to account? It falls to the ground; it is a nullity; and the registered deeds are as if they had never been in suit, and, so far as the present question is concerned, as if they never existed.

The MASTER OF THE ROLLS, after stating at length the findings in the report, and the question thereby submitted for his Honor's consideration, now delivered his judgment upon it to the following effect:—

Mr. Tisdall, the plaintiff in the fifth cause, now moves that the Court may rule in his favour the question submitted by the Master, and that the report may be confirmed, and the fund allocated accordingly. This motion is resisted by certain judgment creditors of the principal defendant John Tisdall—whose judgments intervened between the execution of the unregistered and registered deeds already mentioned,—namely, the executors of Murtagh, who are the plaintiffs in the first cause, and

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v.

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 MURTAGH
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 —
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 —
 CUFFE
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 NEWBURGH
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 SAME.

by the receiver in the first four causes, before any decree was pronounced in the fifth cause, were amply sufficient to satisfy the demands of the plaintiffs in the fourth cause, which were prior to the demands of the parties in any of the first three causes; and inasmuch as the Master should not have been authorised to report under the decree in the fifth cause, the costs of the plaintiffs and defendants in the fourth cause. He now moved that that they might be at liberty, at their own expense, to file a charge on account of their judgment in the office of the Master in the fifth cause, and to procure a separate report thereon; and that the plaintiff in the fifth cause might be stayed until further orders from acting on the order of the 13th instant to the prejudice of the plaintiffs in the fourth cause (a).

Mr. J. H. Blake, Q. C., *contra.*

MASTER OF THE ROLLS.

Newburgh and Parsons are now too late. They might have gone in under the decree to account, and they were parties to the order of reference of 13th December 1839. I think they are barred.

Refuse the application, without costs.

(a) Even if the present application had been granted, Newburgh and Parsons could not, it is conceived, have derived any advantage from it. Had they or Murtagh, as was suggested by the Master of the Rolls upon the previous motion, proved their demands under the decree to account in the fifth cause before the date of the assignment from White and Cuffe to Tisdall, "a very nice question might have been raised;" but whether, even in that case, they could have succeeded in establishing the priority of their judgments to the unregistered deed, may well be doubted:—See Mr. Blake's argument, *ante*, 86. The intermediate judgments were to be advanced by preference of demands upon the registered deed: those demands have never been ascertained, and it does not appear that there were any. It is not easy to perceive how demands can conflict, or have any priority until they are ascertained: any declaration of the Court in their favour, while they rest in statement merely, can be only conditional; and with the greatest deference it is conceived that the cases cited to shew that after decree priorities cannot be altered by the dealings of the parties, have no application to the present. In *Wortley v. Birkhead* there was a final decree for ascertained demands; and what Lord Eldon said in *Ex parte Knott*, must be understood of parties having ascertained demands; so in *Bristol v. Hungerford* the demands of the parties had been ascertained, and there had been a report of priorities. If demands under the registered deeds had been proved upon the account in the fifth cause, either by Cuffe and White or by Tisdall as their assignee, and afterwards Tisdall had said—"I will not take a decree for them, as I am willing that they should remain charges upon the unsold lands,"—the authorities just mentioned might have been urged with great force, but the case would have been totally different from the present.

**JEFFERYES v. GOODWIN, Administrator of ARABELLA
JEFFERYES GROVE.**

1840.

Rolls.

Mr. LESLIE, on behalf of the plaintiff, moved for leave to set down a demurrer for argument, notwithstanding that the time for so doing, limited by the General Orders, had expired. It appeared that the bill was filed on the 6th of June last, and the demurrer, which extended to the whole bill, on the 28th of July.

The application was grounded on an affidavit, made by the plaintiff's solicitor, stating that he resided in Cork, and for the last three or four years had his Dublin business transacted principally through the agency of a correspondent; in consequence of which he was not well acquainted with all the New Rules of the Court of Chancery, and, in particular, he was not aware of the rule limiting the time within which demurrers should be set down for argument (a). The affidavit further stated, that when the demurrer was filed, the Dublin agent was absent from town, and his clerk forwarded to deponent a copy of the demurrer, without any instructions respecting it, or any notice of the rules limiting the time for setting it down for argument, or allowing it and amending the bill;—that deponent, being in ignorance of those rules, did not take the opinion of counsel upon the demurrer, until more than fourteen days after service of the notice of it had expired; and counsel having given it as his opinion that the demurrer should be disallowed upon argument, deponent sought to set it down forthwith, but found that, in consequence of the said rules, he could not then do so without the special leave of the Court.

Mr. F. Ball and Mr. Stearne Miller, for the defendant.—This appli-

Nov. 10.

Where it appeared that by accident, a demurrer, which extended to the whole bill, was not set down for argument within 14 days after notice, pursuant to the 19th General Order of Nov. 1834, the Court allowed it to be set down.

(a) 19th General Order, Nov. 1834.—"That the plaintiff shall be allowed fourteen days from the day on which he shall be duly served with notice of a demurrer, or plea filed, to allow the same by notice on payment of costs, and thereupon he shall be at liberty to amend the bill, making such amendment within fourteen days, or set down the same with the Registrar for hearing, and duly serve notice thereof, and in default the demurrer shall be allowed with costs; and in the case of a plea, the same shall be allowed with costs, and deemed thereafter valid in substance and form, and the parties shall proceed on such plea as if the same were an answer deemed sufficient on the expiration of the said fourteen days."

20th General Order, Nov. 1834.—"That where a demurrer shall be deemed allowed, the plaintiff shall, unless otherwise specially ordered, pay the defendant the costs of the demurrer, and of all proceedings thereon, to be taxed by the Master; and where the demurrer extends to the whole bill, the bill shall stand dismissed, as far as regards the defendant demurring, with the further costs of such to be taxed by the Master, unless within ten days from the allowance of the demurrer, the plaintiff shall amend the bill."

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Rolls.
 {
 JEFFERYES
 v.
 GOODWIN.

cation raises two questions: first, whether the Court has jurisdiction to grant it? and second, supposing the jurisdiction,—whether the Court, in the exercise of its discretion, would grant it under the circumstances? Here, the demurrer is to the whole bill. By the 19th of the New Rules, the plaintiff must amend his bill, or set down the demurrer for argument within fourteen days after notice of it has been duly served, and, in default, the demurrer shall be allowed with costs; and by the 20th of the New Rules, it is declared that where the demurrer extends to the whole bill, the bill shall stand dismissed with costs, so far as regards the defendant demurring, unless within ten days from the allowance of the demurrer, the plaintiff shall amend the bill. The only difference between the Old and New Rules upon this subject is, that the Old Rules allowed only twelve days for setting down the demurrer, and the New allow fourteen. Mr. Daniell, in his *Chancery Practice*, says, “Strictly speaking, upon demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause” (a); *Smith v. Barnes* (b); *Watkins v. Bush* (c). [The merits of the bill were then observed upon.]

Mr. *Leslie* in reply.—There can be no doubt that the Court has jurisdiction to grant the present application, if it thinks proper to do so: *Baker v. Mellish* (d): the Court can relax any of its general orders when justice requires it: *Burrell v. Nicholson* (e); *Lord Lucan v. La Touche* (f). We think, that upon argument of the demurrer it should be disallowed, and that we have a clear case for a decree. It appears plainly that our non-compliance with the rule which requires the demurrer to be set down within fourteen days, was not intentional, but by a casualty; and the simple question is, whether we are to be turned out of Court in consequence of a purely accidental omission on a point of form, having no connexion with the merits of the case, nor in any degree prejudicing the opposite party?

The MASTER OF THE ROLLS said he would read the bill and the demurrer, before he made any order in the case.

Nov 12.

The MASTER OF THE ROLLS now adverted to the foregoing application, and after stating the contents of the affidavit of the plaintiff’s solicitor as already set forth, said,—

This application is resisted on the authority of a passage in *Daniell’s Chancery Practice*, and of two cases in *Dickens* cited to support it.

(a) 2 Dan. Ch. P. 87.

(c) 2 Dick. 701.

(e) 6 Sim. 612.

(b) 1 Dick. 67.

(d) 11 Ves. 72.

(f) 4 Law Rec. N. S. 185.

Mr. Daniell says—"Strictly speaking, upon a demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause (a)," and he cites as an authority for this position the cases of *Smith v. Barnes* (b), and *Watkins v. Bush* (c). In the report of the former case it is merely said, that "a demurrer to the bill was allowed;" and in the latter it appears that the allowance of the demurrer was upon argument: therefore, although Mr. Daniell's statement, as a general proposition, may be true, the cases cited do not carry it to the extent to which it is here sought to be applied; and I think it would have been more correct if it had been directed more particularly to the case of a demurrer allowed *upon argument*. Where, as in the present case, there is a formal allowance of the demurrer, in consequence of its not being set down for argument within the time limited by the general orders, and it appears that it was prevented from being set down within the regular time by an accident, the Court will relieve the party from the effect of the accident, and relax the rule so as to meet the justice of the case. In *Baker v. Mellish* (d), Lord Eldon observed, "It is frequently said in the books, that where a demurrer to the whole bill is allowed, the bill is out of Court, and the plaintiff must begin again. Strictly speaking that is the principle. But I know many instances, where, after a bill dismissed by order, it has been considered in the discretion of the Court to set the cause on foot again." So, in the *Attorney-General v. Fellows* (e), the defendant obtained an order that the bill should be dismissed for want of prosecution, and it appeared that two days before the notice of the motion to dismiss was served, the plaintiff's solicitor had given instructions to his clerk in Court to file a replication, which he omitted to do. Upon an affidavit stating those facts, the Vice-Chancellor restored the cause, considering that it was by a slip that the replication had not been filed. In like manner, in the present case, it was by a slip that the demurrer was not set down in proper time; and applying the principle of the decisions I have just mentioned, I think I am bound to grant the present application (f).

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(a) 2 Dan. Ch. P. 87.—The rule is similarly stated in Barry & Keogh's Ch. P. 204.

(b) 1 Dick. 701.

(c) 2 Dick. 701.

(d) 11 Ves. 72.

(e) 6 Madd. 111.

(f) See the cases of *Stewart v. Service*, 1 Lloyd & G. 303; *In re Lyons*, 1 Dru. & W. 327, 333; *O'Grady v. Barry*, 1 Ir. Eq. R. 13. But although under special circumstances the Court may dispense with the strict observance of any of its general orders, the Masters cannot: *Smith v. Webster*, 3 My. & Cr. 244.

1840.

Rolls.

Nov. 11.

Where a solicitor retains deeds, &c., claiming a lien for costs, this Court upon the client's petition, may by its inherent authority over its officers, refer the bill for taxation, and in case of more than one-sixth being taxed off, disallow the solicitor's costs of taxation, and order that the client's costs upon the taxation shall be deducted from the taxed costs, and that the solicitor shall deliver up the deeds, &c., upon payment of the balance—the Court declining to follow the decision in *Rogers v. Peterson*, 4 Mee. & Welsb. 588.

In the matter of *LAWLERS, Minors.*

ON the petition of Mrs. Lawler, who was mother of the minors and guardian of their persons, and one of the executors of James Lawler deceased, the minors' father, it was ordered on the 8th of December 1838, that it should be referred to the Master to inquire and report whether the late solicitor for the minors, who had also been the solicitor of the said James Lawler deceased, had any lien, and to any and what extent, upon the deeds, documents, or securities relating to the real and personal estate of the said James Lawler deceased, in his possession or power; and if so, out of what fund such lien should be discharged.

Mrs. Lawler lately presented a further petition, stating that on the 14th of October 1840, the Master made his report under the foregoing order, and thereby found, that the said solicitor had in his possession or power the several deeds, documents, and securities mentioned in the first schedule to the report, and claimed a lien on them amounting to the sum of £551. 6s. 6d., being the amount of several bills of costs furnished by him in the month of November 1839, for the purpose of the reference, from which the sum of £313. 0s. 4½d. had been taxed off and disallowed, leaving the sum of £238. 6s. 1½d. certified, including therein £22. 0s. 10½d. the costs of taxation;—that the particulars of said lien were set forth in the second schedule to the said report, and that the said solicitor had received, as admitted by him in his discharge filed on the said reference, of cash collected out of the outstanding debts due to the said testator James Lawler, several sums amounting altogether to the sum of £109. 1s. 3½d., which being deducted from the said sum of £238. 6s. 1½d. left the sum of £128. 16s. 9½d. due to the said solicitor, together with the sum of £8. 0s. 6½d. paid by him on behalf of the plaintiff to the defendant in a certain cause of *Lawler v. Eggleton* therein mentioned, the said two sums making together £136. 17s. 4d.; and the Master reported that the said solicitor had a lien upon the said deeds and documents in his possession to the extent of the said sum of £136. 17s. 4d., which should be paid out of the assets of the said James Lawler deceased.

It appeared that there were several classes of costs, some of which were disallowed altogether, and the others reduced on the taxation considerably more than one-sixth.

The prayer of the petition was now moved. It was,—that the Master's report might be confirmed, and the petitioner be at liberty to bring in and lodge to the separate credit of this matter and of the said solicitor the sum of £114. 16s. 4d., being the amount of the said lien after deducting thereout the said sum of £22. 0s. 10½d. costs of taxation; and thereupon, that the said solicitor should within one week lodge in the

Master's office to the credit of this matter the several deeds, documents, and securities in his possession or procurement relating to the real and personal estate of the testator James Lawler, and all pleadings, copies of deeds, writings, &c., set forth or charged for in the said several bills of costs, to be verified on the oath of the said solicitor; and that he might be ordered to pay to the minors in this matter their costs of the taxation of the said several bills of costs, and that the amount thereof when so taxed and ascertained might be deducted from the said sum of £114. 16s. 4d., and the balance paid over to the said solicitor.

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Mr. Smith, Q. C., and Mr. H. G. Hughes, for the petitioner, cited *Blythe v. Davies* (a); *Silvertop v. Ramsay* (b); *In the matter of Rice* (c).

Mr. Blake, Q. C., and Mr. H. O'Hara on the other side, submitted that the Court had not jurisdiction to grant the present application, as this case was plainly not within the statute.* Here, the solicitor was not the promoveant: he had not commenced any action, but furnished his costs in compliance with the order of this Court, made upon the application of the petitioner, who obtained the reference for taxation without giving any undertaking to pay the sum which might be found due. Although a very large proportion of the costs claimed was disallowed, it did not appear that there was any thing improper or exorbitant in the charges; but the bills happened to include some classes of costs which, in the opinion of the Master, were not properly chargeable as against the minors; *Rogers v. Peterson* (d).

The MASTER OF THE ROLLS, after stating the contents of the petition in this case, now pronounced his judgment upon it as follows:—

The present application is resisted upon the ground that the Court has no jurisdiction, except by statute, to charge the solicitor with the costs of taxation, however exorbitant may have been his bill, and that this case is not within the statute. If the law were so, it could not be altered too soon: for it would just amount to this, that a solicitor having in his possession the title deeds of his client and claiming a lien upon them for costs, may always secure to himself the costs of taxation by rendering those costs unavoidable by the extravagance of his demands. Such is not the doctrine of a Court of Equity. In *Ex parte Bellotti*, in *re Lingard* (e), the solicitor was ordered to pay the costs of taxation, more than one-sixth having been taken off; and there, the bill was re-

(a) 1 *Craw. & Dix*, 223.

(b) 1 *Beav.* 134.

(c) 2 *Keen*, 181.

(d) 4 *Mee. & Welsb.* 588.

(e) 4 *Madd.* 379.

* 7 *G. 2*, c. 14, s. 9.

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ferred without any lodgment of money or undertaking to pay, and the Court does not appear to have had any other authority in the case than its ordinary jurisdiction in bankruptcy. In *Barr v. Wiggins* (a), there was a similar exercise of the authority of the Court. The case *In the matter of Rice* (b) was plainly not under the statute, and perhaps comes nearest to the present. The solicitor in that case, having in his possession certain title deeds of his client, and claiming a lien upon them for costs of conveyancing and other general business not at all contemplated by the statute, refused to give up the deeds until paid those costs. There Lord Langdale, M. R., upon the client's petition, referred the costs for taxation, reserving the question as to the costs of the petition until the return of the report; and one-third of the bill having been disallowed upon taxation, the solicitor was not merely disallowed his costs of taxation, but was ordered to pay the client's costs of taxation and of the original application and subsequent petition to confirm the report. I cannot adopt the reasoning nor follow the decision in the case of *Rogers v. Peterson* (c). Whether I regard the solicitor as an Officer of the Court bound to observe its regulations and practice, and not to exact from the suitors under his direction any other or greater charges than are warranted by such regulations and practice;—or whether I regard him upon the taxation as a party litigating or insisting upon certain demands in this Court,—I can discover no reason, nor colour of reason, for doubting the jurisdiction of the Court to charge him with the costs occasioned by his inequitable proceeding (d).

In the present case, the solicitor, holding the title deeds of his client, claimed a lien for costs amounting altogether to a sum of £551. 6s. 6d., being the total of several bills of costs, some of which have been disallowed altogether, and from every one of which much more than one-sixth has been taxed off; so that the amount certified is considerably less than one-half of the original demand. I have, therefore, no doubt as to the propriety of the order I am about to pronounce.

ORDER:—That the report made by William Curry, Esq., the Master in this matter, bearing date the 14th October 1840, do stand confirmed; and that the sum of £22. 0s. 10½d., in said report mentioned as the said solicitor's costs of taxation, be deducted from the sum of £136. 17s. 4d. reported due to him; and the Court doth declare that the said solicitor ought, under the circumstances in the said report and petition mentioned, to pay the costs incurred by the petitioner Eliza Lawler, the

(a) 4 Sim. 125.

(b) 2 Keen, 181.

(c) 4 Mee. & Welsb. 588.

(d) See *Beames on Costs*, 2nd ed. pp. 168, *et seq.*

guardian of the said minors, in having the several bills of costs claimed by the said solicitor taxed; and accordingly it is further ordered, that the said Master do tax and ascertain the said costs; and that the same when ascertained shall be deducted together with the said sum of £22. 0s. 10½d. from the said sum reported due to the said solicitor; and that the residue be paid to him out of the funds in bank to the credit of this matter; and accordingly, that the Accountant-General do, out of the government stock now in bank to the credit of this matter, transfer so much, &c., as with the approbation of the said Master will be equivalent to the balance that the said Master shall certify to be due to the said solicitor on foot of the said costs, after such deductions as aforesaid; and it is further ordered that the said solicitor do, within one fortnight from the date of this order, bring in and lodge in the office of the said William Curry, Esq. the Master in this matter, the several deeds, documents and securities in his possession or procurement relating to the real and personal estate of the testator James Lawler, and all pleadings, copies of deeds, and writings set forth or charged for in the said bills of costs of the said solicitor, to be verified by affidavit.*

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* The form of the petitioner's proceeding in the foregoing case passed without observation, although it is conceived, it was not in strictness free from objection. It may be observed that the Master having discretion to allow or disallow the solicitor's costs of taxation (see the 10th General Order, February 1839), included them in the sum certified; and therefore it would seem that the report should have been objected to, and that, in strictness, the application should have been, not that the report might stand confirmed, but that it should be varied according to the objections. See the following case.

POWER v. NAGLE.

Nov. 17.

AFTER this cause had been far advanced, the solicitor of one of the parties on whose behalf very heavy costs had been incurred, furnished his bill to his client, and required him to pay or give security for the amount, and declined otherwise to be further concerned for him. Some fruitless but irritating negotiation ensued, in consequence of which the solicitor wrote to the client, discharging himself as solicitor; and more than a month having elapsed after the delivery of the bill, commenced

A solicitor furnished his bill to his client, and, after the expiration of the month allowed by the statute, commenced an action for the amount, the client having taken no step

in the mean time. Afterwards, upon the client's petition the action was stayed, and the costs were referred for taxation, the client undertaking to pay whatever should be the sum certified as due. Upon the taxation, more than one-sixth having been taken off, the Court ordered that the solicitor's costs of the taxation should be disallowed, and also that the client's costs of the taxation, and of the application upon the return of the report, should be deducted from the amount of the taxed costs.

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an action for the amount.* In the mean time, the client appointed another solicitor, to whom the former solicitor was called upon by notice to hand over all the client's papers, &c., in his possession, necessary to enable the new solicitor to proceed in his stead, and subject to such lien for costs, if any, as he might have. This was refused; and thereupon the client presented a petition, praying that the former solicitor should hand over all the papers, &c., subject to such lien as he might have for costs; and that it might be referred to the Master to tax the same—the client thereby undertaking to pay whatever sum should be found due; and that in the mean time the action might be stayed. The costs were accordingly referred for taxation, and the action stayed as desired; and upon the taxation some considerable cash advances made, as it was alleged, by the solicitor, on account of a commission to Cork, and other matters having been disallowed, more than one-sixth of the bill as furnished was taken off; but the Master included in the sum certified on foot of the costs the solicitor's costs upon the reference. Two objections were taken to the report: first, that more than one-sixth of the bill having been taken off, the solicitor's costs incurred upon the taxation should have been disallowed and not included in the sum certified; and second, that for the same reason, the petitioner's costs of taxation should have been allowed and deducted from the sum certified. The Master having declined to yield to these objections,—

Mr. *Brewster*, Q. C., for the petitioner, now moved that the Master's report should be sent back to be reviewed, and that he might be directed to deduct from the sum certified the solicitor's costs of taxation, and also the amount of the client's costs of taxation; and that the solicitor should be ordered to pay the costs of the petitions, and of this motion.

Mr. *Collins*, Q. C., and Mr. *Michael Barry*, for the solicitor, submitted, that as the petitioner had not taken any step within the month allowed by the statute, and suffered an action to be commenced against him, the subsequent reference was not under the statute, and therefore that the Court had not jurisdiction to grant the present application: *Smith's Chancery Practice*, 707; *Jay v. Coaks* (a); *Burton v. Bullard* (b); *Rogers v. Peterson* (c).

(a) 3 Man. & Ry. 35; S. C. 8 Bar. & Cr. 635.

(b) 4 Bing. 561.

(c) 4 Mee. & Welsb. 588.

* *Quere.*—Could this action have been maintained?—It has been held, that pending the cause in which costs are incurred, the statute of limitations does not run against a solicitor's demand. See his Honor's judgment in *Rutledge v. Rutledge*, 2 Ir. Eq. Rep. p. 295, and the cases there cited.

Mr. *Brewster*, in reply, cited the following cases:—*Elwood v. Pearce* (a); *Featherstonhaugh v. Keen* (b); *Baker v. Wills* (c); *Murray v. Barlee* (d); *Davison v. Allen* (e); *Holderness v. Barkworth* (f); *Silvertop v. Ramsay* (g); *In the matter of Rice* (h); *Blythe v. Davies* (i).

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NAGLE.

The MASTER OF THE ROLLS, after adverting briefly to the facts of this case, and to his decision in *Lawlers, Minors*, made the following order:—

Let the parties abide their own costs of this reference, save so far as hereinafter directed; and declare that the sum allowed to the said solicitor for the costs of taxation ought to be disallowed, and deducted from the sum of £610. 12s. 6d., certified by the Master to be due for costs; and declare that the costs incurred by the said petitioner on the taxation ought to be allowed, and deducted from the amount of the said taxed costs; and accordingly, let the Master ascertain the amount thereof, and deduct the same, together with the costs of this application; and let the solicitor for the said petitioner furnish the amount of the costs of this application within one week from the date of this order; and let the said petitioner, pursuant to his undertaking contained in the order of reference bearing date, &c., pay to the said respondent the sum so to be ascertained within one week after the Master shall certify the same; and on payment of the sum which the Master shall certify to be due, let the respondent hand over the said deeds and documents, &c. relating to these costs, verified by affidavit.

(a) 8 Bing. 83.

(b) 3 Tyr. 540.

(c) 4 Tyr. 279.

(d) 7 Sim. 194.

(e) *Jurist* for 1840, p. 859.

(f) 8 Mee. & Welsb. 391.

(g) 1 Beav. 434.

(h) 2 Keen, 181.

(i) *CrawL. & Dix. Ab. N.C.* 223.

1840.

Chancery.
Nos. 14, 16,
17, & 18.

MANNIX v. DRINAN.

(In Chancery.)

The consor of a judgment, by his will in 1802, bequeathes certain leaseholds specifically, and appoints the consor a trustee under his will. The executor assents to the bequest in 1808, having at the time assets for the payment of all debts of the testator.

A suit is instituted in 1812 for a sale of part of the testator's property by a specific encumbrancer, and under the decree in that cause, the judgment is proved, and declared a charge on the premises. No sale takes place, and after the death of the consor in 1822, his widow, who was entitled to the judgment under a settlement which gave the consor a life interest in it, files her bill to raise the amount, which she amends in 1835, making parties the specific legatee, his wife and children, upon whom the chattel had been settled by a post-nuptial settlement:—*Held*, that she was entitled to compel the owner of the chattel to contribute to the payment of the judgment.

A creditor who, by lying by, permits the executor, having at that time assets for payment of debts, to pay a legacy, does not thereby lose his right to compel that legatee to contribute to the payment of his debt, if the executor subsequently waste the assets; but the assets of the defaulting executor must be first resorted to, and the insolvency of the executor not having been proved:—*Held*, that the legatee was entitled to an inquiry upon the point, even after a decree to account, and a report under it.

ANDREW DRINAN, the testator in the pleadings of this cause named, on the 10th of February and 7th of April 1796, executed two bonds with warrants of attorney collateral, in the penal sums of £1000 each, conditioned for securing £500 of the then currency to Thomas Mannix, attorney. Two judgments were entered on these bonds, one in Trinity Term 1796, and the other in Michaelmas Term 1799, and Mannix, by deed of the 15th January 1800, executed on his marriage with the plaintiff Charlotte Mannix, assigned those two judgments, to trustees, upon trust, to pay the interest to himself for life, and after his decease, to his intended wife, the plaintiff, for her life; and in case she survived him, and there was no issue, then upon trust for her absolutely.

Andrew Drinan, the consor of these judgments, was, in and prior to the year 1802, seized of several denominations of land for freehold interests, and, amongst the rest, of the lands of Raffeen, which he held under a lease for lives renewable for ever, and was entitled to chattel interests in various other denominations of land, and, amongst the rest, the lands of Maglin and Ballyorban, for long terms of years, and was also entitled to very considerable personal property, the chief part of which was invested in a valuable brewery, held for a long term of years. He, by his will, dated the 9th of February 1802, directed his debts to be paid out of all such property as he should die seized of or entitled to, and expressly postponed all bequests in his will to the payment thereof, and subject thereto, devised the said lands of Raffeen to Bartholomew Foley and Thomas Mannix (the consor of the two judgments), upon trust for his wife Mary Drinan, for life, and after her decease to his son George Drinan, his heirs and assigns, and bequeathed the said lands of Maglin to his son David; and by his said will, he bequeathed the lands of Ballyorban to the same trustees, upon trust for his son John Drinan, when he should attain the age of twenty-three years, absolutely; and he gave and bequeathed the brewery concerns to the same trustees, upon trust, as to one-third for his son George, and as to another third for his son Andrew; and as to the remaining third, upon trust for his widow for life, and, at her death, for such of his

sons as she should by will appoint. The stock in the brewery the testator gave to his sons George and Andrew, and his widow, share and share alike, provided the same did not exceed £4000; but if it should be found upon a valuation to exceed £4000, then the surplus to go to his widow; and if she did not exercise her power of appointment as to her own third, then the same was to go to his said sons equally. He gave legacies of £2000 each to his daughters Anne and Margaret, and he made his widow sole residuary legatee, and appointed her executrix during her life, and at her death, his sons George, David, and Andrew.

The testator died shortly after the date of his will, without having altered or revoked it, leaving his two daughters Anne and Margaret, his five sons George, Andrew, David, Charles and John, surviving.

The testator's widow (Mary) proved the will, and she and her sons George and Andrew carried on the brewing business on the testator's concerns in partnership for some years.

The debts due by the testator were very small, compared with the amount of his personal estate; and shortly after his death, his son David, with the assent of the executrix, went into possession of the lands of Maglin; and when John attained his age of twenty-three years, he also, with the like assent of the executrix, possessed himself of the lands of Ballyorban.

On the 11th of June 1807, George Drinan mortgaged his share of the brewery, and other premises which had been devised to him by the testator, to his brother Andrew, for securing £7500. That mortgage included some premises adjoining the brewery, which had never been the property of the testator, but upon which certain extensions of the concern had been built after his death.

Shortly afterwards, Mary Drinan assigned her share to George, in consideration of his taking on himself the payment of the two legacies given to his sisters: and he accordingly, by deed of the 25th of February 1808, mortgaged the brewery for £4000 to John Williams, who had married testator's daughter Margaret, upon trust as to one-half for the other daughter Anne.

Andrew Drinan, on the 14th of February 1812, assigned the mortgage for £7500, to John Haynes, as a collateral security for £1000.

The interest on Mannix's judgments was paid up to the year 1813, from which period it was suffered to fall into arrear.

On the 30th October 1812, John Williams filed his bill to foreclose the mortgage of the 25th February 1808, executed to secure the legacies to the testator's daughters. On the 11th December 1813, a decree to account was pronounced, under which the Master was directed to take an account of what was due on foot of the mortgage of the 11th June

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1807; and all persons having debts or encumbrances prior to the mortgage of February 1808, were declared at liberty to come in and prove.

A supplemental bill was filed on the 19th of October 1814, against J. Haynes, to which he appeared and answered.

The surviving trustee in Mannix's marriage settlement proved the judgments under the decree, and the Master reported £1092. 8s. 5d. to be due to him on foot of them for principal, interest, and costs.

A final decree was pronounced on the 3rd of March, 1815, by which George Drinan was directed to pay the amount of the mortgage, and of all prior encumbrances (including Mannix's judgments), and that in default of his doing so, the premises comprised in the mortgage should be sold, and that out of the purchase-money, the plaintiff in that cause and the several prior encumbrancers should be paid the amount of their demands according to their priorities; and in case the produce of the sale should be insufficient, after paying all prior encumbrances, to satisfy the demand of the plaintiff Williams, then it was directed that an account should be taken of the real and personal estate and effects of the testator Andrew Drinan.

Under that decree, the mortgaged premises were set up for sale in 1815, and Andrew Drinan was declared the purchaser, for a sum of £5900. No steps, however, were taken to confirm the sale, and no further proceedings were had in the cause.

Mary Drinan, the widow and executrix of the testator, died in 1820, and George Drinan took out administration to her, and afterwards he obtained probate of the will of the testator Andrew, as the surviving executor.

There was no issue of the marriage of plaintiff with Thomas Mannix, and he died in December 1822, having bequeathed all his personal property to the plaintiff, and appointed her executrix. She proved the will, and on the 30th of November 1826, filed an original bill, for the purpose of having the amount of the judgments raised out of the real and personal estate of the testator, and brought before the Court several parties who had acquired interests in the real estates of the testator, and amongst the rest John Drinan, as entitled to a mortgage of Raffeen.

In 1835, plaintiff amended her bill, introducing statements shewing the devolution of various portions of the landed property of the testator, both freehold and chattel, and seeking to compel them to contribute to the payment of the judgments: and she also set forth the proceedings of the cause of *Williams v. Drinan*, and prayed that she might have the benefit of the decree pronounced in it, and that an account might be taken of what was due to her on foot of her several demands, as ascertained by that decree, and of the interest that had since accrued due on the principal thereof; and also an account of the real and personal estate of the testator.

To this amended bill, representatives of the original testator of his widow Mary and of his sons George, Andrew and David, all of whom had been set up by the plaintiff herself, were parties. That bill also stated that John Drinan, by deed of the 19th of February 1824, assigned the lands of Ballyorban, upon certain trusts, for his wife and children, and that they claimed an interest in said lands under that. He, his wife and children (all of whom were minors) were made parties, and the personal representative of the trustees in that deed were also brought before the Court.

John Drinan and his wife never answered the amended bill, which was taken as confessed against them; and the usual minors' answer was put in for their children, by the plaintiff.

On the 1st of May 1837, a decree was pronounced, by which it was declared that the plaintiff was entitled to the benefit of the decree of 1815; and it was referred to the Master to take an account "of what was due and owing to the plaintiff, on foot of her several demands for principal, interest and costs, ascertained to be due by the decree pronounced in the cause of *Williams v. Drinan*, on the 3rd of March 1815, and of the interest which had since accrued due on the principal thereof," according to the plaintiff's priority, and of the debts, legacies, and funeral and testamentary expenses of the testator Andrew Drinan, and of the real, freehold, and personal estate and effects of the said Andrew, in whom vested, and who are now entitled to the same respectively, and subject to what debts, charges, and encumbrances.

The Master made his report under that decree on the 11th of June 1840, and by that he found that there was due to the plaintiff, as executrix of Mannix, and in her own right, on foot of the judgments, the entire of the principal sum secured thereby, and interest on the said principal sum from the 22nd of February 1815 (up to which time interest had been computed thereon, in the cause of *Williams v. Drinan*) up to the 22nd of November 1839, making the entire amount due for principal and interest exceed the penalties of the bonds.

The report found that there were not any other debts of the testator due at his decease, and that the testator's interest in the lands of Raffeen had been conveyed by George Drinan, by deed of the 6th of May 1831, to William Andrew Drinan, one of the defendants, in whom it remained vested. That John Drinan having attained twenty-three, executed two leases of Ballyorban, bearing date respectively the 29th January 1808, and 21st of February 1809, to Thomas Cuthbert.

That John Drinan and his undertenants had been ever since the execution of these leases in the exclusive possession of these lands, and that they were now vested in him subject to the debts of the testator. The report also found the facts stated before respecting the brewery, and and that George Drinan let it in 1810, together with other premises

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adjoining, acquired by him, and on which he had built an extension of the concern, at a rent of £1800 and a fine of £5000. It then found the mortgage by George to Andrew, the sub-mortgage by Andrew to Haynes, and that the defendant Elizabeth Haynes, his personal representative, then held the same as a security for the balance due on foot of the sub-mortgage.

With respect to the lands of Maglin, the report contained a special finding, that David, to whom the testator's interest therein had been specifically bequeathed, entered into possession thereof shortly after the testator's death, the executrix having assented to the bequest; and that he continued in possession until 1811, and that in the month of November in that year he sold his interest therein to James Connell, the husband of defendant Mary Connell, for the full value,—and that Connell, when he paid the purchase money, had no notice of either of the plaintiff's judgments; that Connell's interest in the lands was vested in the defendant Mary; and that no proceedings had been taken against James Connell, or the defendant Mary, to compel contribution to the debts of the testator until 1835, and submitted to the Court whether the said lands were subject to the testator's debts and liable to be considered as part of his assets? The report found that all the lands devised by the testator had been lost by expiration or eviction, except the premises therein specified, including Raffeen, Ballyorban, the premises in Barrack-street, Maglin and others, which it is unnecessary to specify here; all of which except Maglin, as to which there had been a special finding, were found to be subject to the debts of the testator.

The report further found that the brewery and other concerns, and other personal property of the testator, consisting of stock in trade, debts due to him, household furniture, and other moveables, amounted in value to £10,000, all which had come to the hands of the executrix and executors of the testator, and was wasted by them, and that no part of the personal property of the testator was then forthcoming, save the leaseholds for years.

To this report the defendant John Drinan, his wife and children, who were still infants, took six exceptions. The first of which was, that the Master had reported interest beyond the penalty to be due to the plaintiff.

The second and third exceptions related to the amount of the testator's personal property, found to have come to the hands of executrix and executors, which the defendant contended ought to have been found of much larger value. The fourth was on the ground that the Master had not found that Mannix acted as the trustee of the testator's will, as his attorney, and the attorney of his widow and of other members of his family. The fifth was because the Master had not reported the sale under the decree of 1815, and that Andrew Drinan had purchased the brewery premises and remained in possession; but no exception was

taken to the finding in the report that Ballyorban was subject to the testator's debts.

The cause was set down by the plaintiff to be heard upon the report and exceptions, and by the defendant J. Drinan for further directions.

Mr. Pennefather, Q. C., Mr. Warren, Q. C., and Mr. Collins, Q. C., for the plaintiff.

Mr. W. Brooke, Q. C., Mr. Blake, Q. C., and Mr. Haig, for the defendant John Drinan, his wife and children.

The Solicitor-General, Mr. Serjeant Greene, and Mr. Henn, Q. C., for the defendant William Andrew Drinan.

Mr. Longfield for the defendant Elizabeth Haynes.

With respect to the first exception, it was contended by the counsel for the defendant J. Drinan, that the decree of 1837, when it directed the Master to compute the interest that accrued since 1815, meant merely interest according to the course of the Court, not exceeding the penalty; and for that they cited *Hamilton v. Houghton* (a), and *Gorman v. Arthure* (b). That the only case in which Courts of Equity gave interest beyond the penalty was, when the creditor had been prevented from obtaining payment by the acts of the debtor whose estate was sought to be affected, and that such acts must amount to misconduct; and they relied on the cases of *Clarke v. Seton* (c); *Moore v. Macnamara* (d); *Hughes v. Wynne* (e); *Berrington v. Evans* (f); *Grant v. Grant* (g); *Hickson v. Ayloard* (h); and *Sterling v. Wynne* (i); for this purpose,—and to shew the rule at law *McClure v. Dunkin* (k), and *Arnott v. Redfern* (l), were cited.

For the plaintiff it was contended, that upon the true construction of the decree of 1837, the Master was warranted in allowing interest beyond the penalty. That in *Hamilton v. Houghton* the decree merely directed that interest should be computed; and in *Gorman v. Arthure* the direction was, that the Master should take an account of what was due for principal and interest; but that here the plaintiff was declared

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(a) 2 Bligh. 169.

(c) 6 Ves. 414.

(e) 1 My. & Kee. 20.

(g) 3 Sim. 340.

(i) 1 Jones, 51.

(b) Ll. & Goold, Cas. temp. Plunket, 235.

(d) 1 B. & B. 309.

(f) 1 Young, 46.

(h) Ll. & Goold, Cas. temp. Plunket, 233.

(k) 1 East, 436.

(l) 3 Bing. 353.

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entitled to interest. That when the decree was pronounced there were seven years' interest due beyond the penalty, and that, therefore, the direction in the decree to calculate accruing interest shewed that the Court must have meant that the plaintiff was to have interest beyond the penalty. That the delay had been occasioned by the acts of the defendants in dividing the property into a great number of fractional parts, rendering it necessary for the plaintiff to make upwards of sixty defendants; and the case of *Hyde v. Price* (a)* was cited.

The LORD CHANCELLOR.

This exception must be allowed. I do not think that any case has been made to entitle the plaintiff to interest beyond the penalty, either in allegation or proof. No case has been made either of misconduct on the part of the defendant whose estate is sought to be affected, or of difficulties in the way of the plaintiff's recovering this debt, to take this case out of the general rule, that interest shall not be recovered beyond the penalty. The counsel for the plaintiff have rested their case on the decree of 1837, which they contend has given interest beyond the penalty; and if it have done so, of course there is an end of the case, as this is not a rehearing of the cause. If it had done so, it would have directed nothing that was unjust or inequitable, but I cannot find any thing in it to shew that it has done so. I must, therefore,

Allow the first exception.

All the other exceptions were overruled—the fourth, because the facts stated in it appeared on the face of the plaintiff's amended bill,—and the sixth, because the sale in 1815 was part of the proceedings in the cause of *Williams v. Drinan*, of which plaintiff sought the benefit; and it was, therefore, unnecessary that it should appear upon the report.

On the part of the plaintiff it was contended, that there was no *laches* on the part of Mannix in not having enforced payment earlier, as he was paid interest down to 1813; and even if there were, the plaintiff, who was a *feme covert* down to 1822, when her right first accrued, could not be affected by it, and that any attempt to controvert her rights now was inconsistent with the decree of 1837, which gave her the benefit of the decree of 1815. That John Drinan and his wife allowed the will to be taken as confessed against them and their children, appeared by counsel at the hearing. That they had taken no exception to the part of the

(a) 8 Sim. 578.

* See the report of this case in *Mr. C. P. Cooper's Reports*, 1 vol. 193, where all the authorities on this subject are discussed in a note of the editor.

report which found Ballyorban to be subject to the debts of the testator. That the plaintiff's was the ordinary case of a creditor coming into a Court of Equity to compel a legatee to refund when the assets prove deficient, and that the *onus* lay upon the defendants of proving before the Master that there were general assets. That the fact of plaintiff's being obliged to raise representatives to the executrix and executor shewed that there were no assets of the latter to answer any *devastavit*. That if any such inquiry were to be directed now, it should be at the expense of the party seeking it, and the plaintiff should not be delayed in the meantime; that a receiver should be appointed over all the property of the testator. That the statute of limitations did not apply, as John Drinan was a party to the bill of 1826, which sought a general account of the real and personal property of the testator, and the statute did not apply to suits pending when it passed,—and that as to his children, the decree of 1837 was as binding on them as if they were adult. In order to shew that the right of a creditor to compel a legatee to refund when the assets prove deficient, is not affected by the circumstance that at the time when the legacies were paid there were assets in the hands of the executor for the payment of the debts, they cited *Hodges v. Waddington* (a), *Anonymous* (b)—which is the same case as that in *Ventris*,—*Newman v. Barton* (c); *Hardwicke v. Mynd* (d).

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On the part of the defendant John Drinan, his wife and children, it was contended, that the bill should be dismissed as against them with costs, as Mannix recognised his going into possession, and was a party to the leases of 1808 and 1809, as a trustee under the testator's will, at a time when the executrix had ample assets for the payment of the debts, and as his possession had never been disturbed since. That the bill of 1826 made J. Drinan a party merely as a mortgagee of Raffeen, and the prayer of that bill was for payment out of the real and personal estate of the testator. That the mortgage to Williams in 1808, for securing the legacies, was an admission of assets for the payment of debts, and the plaintiff should have shewn that there were none forthcoming; that a creditor cannot, by merely alleging a deficiency of assets, compel a legatee to refund; *Orr v. Kaimes* (e). That in the cases of *Hodges v. Waddington*, and *Newman v. Barton*, and *Hardwicke v. Mynd*, the insolvency of the executor was proved. That even when the insolvency of the executor was proved, relief was refused to legatees when the assets were sufficient at the time; *Walcot v. Hall* (f); *Orr v. Kaimes* (g); *Maglin v. Cooper*, stated in the note to the preceding case in Mr. Bell's edition

(a) Vent. 360.

(c) 2 Ver. 205.

(e) 2 Ves. sen. 194.

(b) 1 Ver. 162.

(d) 1 Ans. 109.

(f) 2 B. C. C. 305.

(g) 2 Ves. sen. 194.

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of *Brown*. That the only cases in which a legatee was compelled to refund for payment of debts, was where these debts could not have been provided for at the time; *Chelsea Waterworks v. Cooper* (a); *March v. Russell* (b). That plaintiff might have got full relief in the suit of 1812 by merely applying for carriage of the decree, instead of which she filed a new bill and amended it in 1835, making every one who appeared by the registry to have got any interest in the lands of the testator, a party. That in the present suit plaintiff could not compel a specific legatee to contribute until the primary fund for the payment of the debts, namely, the assets of the defaulting executrix and executors, was exhausted; that plaintiff had given no proof that there were no such assets, and that under the decree of 1837, which directed an account of the property of the testator, no account could be taken of the assets of the executrix or executors. That defendants were entitled to a further inquiry upon that point, not merely to settle equities between themselves, but to shew that there is no ground for the plaintiff's equity against them. That this was open to the defendants on the report, although they had not excepted, as the matter appeared upon the face of it, and was a question not of fact but of law; that in the case of *Taylor v. Gorman* (c), it had been decided that where a matter appeared on the face of the report, an exception was not necessary.—[The LORD CHANCELLOR. I do not think the case cited is precisely in point. Where the Master stating in his report all the facts, draws an inference from those facts, there the Court, having all the information before it, may draw its own inference, even though it should differ from that of the Master. But is there any authority to shew that where the Master has founded a conclusion upon particular facts, which conclusion would be right if there were not other facts in the case, which the Master has not found, an inquiry could be directed as to those facts, at the instance of a party who had not excepted to the report in that particular?]—That the case fell within the principle of *Brodie v. Barry* (d), and *Adams v. Claxton* (e). That by the decree of 1815 George Drinan was directed personally to pay these judgments, and a fund had been realised in that cause which would have been available for the payment of the plaintiff, if due diligence had been used by the trustee. That that decree would be followed up by making the assets of George available. That the decree of 1837, directing the accounts of 1815 to be carried on, did not displace the right of a legatee to contend that a creditor could only come on them in default of the primary fund; and the report finding the lands of Ballyorban subject to the debts of the testator, decided nothing as to the

(a) 1 Esp. 275.

(c) Not reported as to this point.

(b) 3 My. & Cr. 36.

(d) 5 Ves. 225.

(e) 1 Ja. & Wal. 471.

order in which they were then to be resorted to. That notwithstanding the decree of 1837 it was still open, at least to the minors, to contend that the plaintiff's right was barred by the statute of limitations, as more than twenty years had elapsed without any claim on the part of the plaintiff to affect those lands. That a receiver could not be appointed pending the inquiry, because it might turn out that these lands could not be resorted to at all, and that the fund was not in danger in the interim.

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Mr. *Longfield*, for the defendant Elizabeth Haynes, contended that the plaintiffs could not resort to the premises on which they had the sub-mortgage without paying her; that she was a purchaser from a specific legatee, after the executrix had assented to the bequest; and as such could not be made liable to the debts of the testator (*a*); and that although the report of the Master in the cause of *Williams v. Drinan*, had found her charge to be *puisse* to those of plaintiff, that was manifestly erroneous, and the Court would now set it right, as the whole matter appeared upon the face of the proceedings.

[Upon opening the case for the plaintiff, Mr. *Pennefather* stated, that he did not mean to argue the special point submitted by the Master respecting Maglin,* as the other lands were sufficient for the payment of the plaintiff's demands; but that it was open to any of the defendants who chose, to insist, that those lands were liable to be made contribute. None of the defendants' counsel, however, argued the question; the special point was ruled in favour of the defendant Mary Connell, and the bill was dismissed against her with costs.]

THE LORD CHANCELLOR.

A good deal of argument has been used in this case with respect to the situation of Mannix, both as a trustee under the will of the testator and as the confidential law adviser of the executrix, but no question has been raised as to the original validity of the demand which the plaintiff seeks to enforce, the fairness of which is not disputed. The principal question has been, not the original fairness of those demands, nor even their amount, but the fund out of which they are to be paid. The counsel for John Drinan contend, that there has been such *laches* on the part of Mannix, that all right to proceed against the portion of the testator's property in the possession of their client is gone. Now, I do not concur in that argument, nor think that any blame is to be attributed

(a) *Spackman v. Timbrell*, 8 Sim. 260.

* See in addition to the case of *Spackman v. Timbrell* cited by Mr. *Longfield*, the case of *Chamberlain v. Chamberlain*, 1 Ch. Cas. 257, and 2 Free. 142, and the observations of Lord Cottenham, C., in his judgment in *March v. Russell*, 3 My. & Cr. 41.

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to Mannix for not enforcing payment of his debt earlier from these parties; on the contrary, perhaps, there would have been some degree of harshness in his conduct, considering the situation in which he stood towards them, if he had pressed for payment of the debt which appeared to be amply secured, and on which interest appears to have been paid.

In 1813, a suit is instituted for a sale of part of the testator's property, and a decree made; and he comes in and proves his debt under that decree, and it is declared a charge on the lands set up to be sold. No sale, however, takes place, and he dies in 1822. He was only tenant for life of this fund, and on his death the rights of his widow accrue. Up to that time she had been a *feme covert*, and could not be affected by the acts or defaults of her husband. In 1826 she files her bill to raise the amount of these judgments, and a decree is made in that cause, establishing her right to be paid the amount of them; and a report is made under that decree, to which, in this respect, no exception has been taken. It is said that John Drinan was not a party to the bill of 1826, and is not to be affected by it. Now, whether he has or not, that alone is not such *laches* as to disentitle the plaintiff to relief. But even supposing that he was not, he was confessedly a party to the bill of 1835. He appeared in that cause—he was then of full age—he had perfect cognizance of all dealings and transactions respecting the property—he had then a full opportunity of setting up the statute of limitations, had he been so inclined; but, probably, knowing that that would not be a just course for him to pursue, probably satisfied of the fairness of plaintiff's claim, he neglects to do so, and suffers the bill to be taken as confessed against him. The statute of limitations may be a very just defence where it proceeds upon a presumption of payment; but in order to entitle himself to the benefit of it, a party must set it up at the proper time; and I cannot now, at this stage of the suit, set up such a defence for a party who has neglected to avail himself of it when he had the opportunity. But then, it is said, although he is concluded, his children, who are minors, are not, and that they can seek the benefit of the statute. I think that neither is it open, to them to do so. The minors appeared in the cause—their trustee was a party to the suit; and as the bar of the statute was not relied on in their behalf at the original hearing, it cannot be resorted to now. In my opinion, the mouths both of the father and of the children are closed by the decree of 1837, and neither of them can resist the right of the plaintiff to the relief which that decree gives her. By that decree, an account was directed of the real and personal estate of the testator, in whom vested, and by what title; and with that direction the case goes before the Master. It is then inquired into, the facts are ascertained; the parties had in the office an opportunity of establishing any case of exemption from the general liability to contribute to the payment of these debts which they might be entitled to. The Master makes his

report, finding that those debts are charges on all the property specified in it, and to that finding no exception is taken. Under those circumstances, it would be most unjust to attribute any *laches* in fact to the plaintiff here.

But then comes another question—not of *laches* in fact, but of *laches* growing out of the general principle of law—whether, if an executor, who has assets for the payment of all the debts, pays legacies—a creditor who lies by, not enforcing the payment of his debt, and suffers the legacies to get into the hands of the legatees, can afterwards, when the assets prove deficient, compel those legatees to refund? That is a question that has never yet been decided, and it is not necessary for me to decide it in the present case. I have no hesitation in saying that I have formed a strong opinion upon it. I have not been able to find a distinct authority upon the point. The two cases in *Vernon, Hodges v. Waddington* and *Noel v. Robinson*, were cases in which one legatee sought to compel contribution from another; and in stating the right of the legatee to compel that contribution, they state it as subject to the qualification, that the executor must not have had sufficient for the payment of all the legatees at the time when he made the payment to one; and that if he had assets which were subsequently lost by his *devastavit*, no right of contribution exists; but in stating the right of the creditor, they state it without any such qualification; and although as I have said, there is no decision upon the point, yet we have the *dictum* of Lord Nottingham in *Noel v. Robinson*, and that of the Lords Commissioners* in the case of *Newman v. Barton*.

There is also the passage which has been cited from the *Treatise on Equity*, which, although a text-book, yet, as the author is dead, may be referred to, not as an authority which is to govern the Court, but as shewing his opinion, and as such entitled to some weight. In Mr. *Williams*' book *On Executors*, the same position is laid down, but he cites no authority for it; and although Mr. *Williams* is a respectable text-writer, and his work one of considerable merit, yet I do not consider him as an authority. The case in *Anstruther* certainly goes a great way; for there the creditor had actually dealt with the administrator, and received a higher rate of interest. I am not prepared to say that I should follow that case to its full extent; yet even there, the legatees were compelled to refund only on failure of the other fund. That other fund in this case is the assets of the defaulting executrix and executors; and I do not think that the deficiency of that which is the primary fund has been sufficiently proved. No such case is made, either by the bill of 1826 or that of 1835; and I think that the legatees are entitled to have an inquiry directed upon the point. But considering the time at which they call for that inquiry, and the stage of the suit at which the objection is set up, I am

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bound to take care that no injury is done to the plaintiff, whose debt is not now bearing interest, by the delay which such an inquiry might occasion. What I am disposed to do, therefore, is, to give the defendants the inquiry, putting them under terms of procuring the Master's report within a given time; and that if the report be not procured within that time, then a receiver to go over all the property which the Master finds to be subject to the debts of the testator.

Mr. *Longfield* contends, on behalf of Mrs. Haynes, that although no exception has been taken by her, yet that the Court will not decide against the manifest justice of the case appearing on the face of the report, which states the facts so as to enable the Court to draw an inference from them different from that drawn by the Master. But here the party whom his client represents was a party to the suit of 1813, the decree in which expressly finds these judgments to be the first encumbrance on the property included in the mortgage; and the present defendant was a party to the bill of 1835, and allowed it to be taken as confessed against her; and under that decree a report is made, finding this property subject to the debts, and she has not excepted to the report. I must therefore consider her as bound by the decree of 1815, to which her husband was a party, and by that of 1837, which she allowed to be made against herself.

By the notes of the decree ultimately drawn up, the plaintiff was declared entitled to a sale of the lands and premises found by the report to be subject to her demands; such sale to be suspended until the Master shall have made his report upon the matters thereby referred to him, or the cause shall be set down for further directions; and let the Master inquire and report how much of the sum of £10,000, in the report mentioned, came to the hands of the executors of Andrew Drinan respectively, and how much of that part thereof which was not specifically bequeathed was wasted by them respectively; and also inquire and report whether there are any and what personal assets of said executors, or of any and which of them, available to make good such sum as he shall find to have been wasted by them respectively. And let the defendant John Drinan have the carriage of said reference; and let him procure the Master's report thereunder within six months. And upon the making of the said report, or in case the same shall not be made within the time aforesaid, let the plaintiff or any of the parties in the cause be at liberty to set down the cause for further directions. And let the Master inquire and report in what order the lands found subject to the plaintiff's demand ought to be sold, and in what order the produce of the same should be applied, or whether, as between the defendants, the said lands should contribute in any, and what proportion, towards payment of plaintiff's demands.

BARRY, *Petitioner*; WILKINSON, *Respondent*.

CAREY, *Petitioner*; SAME, . . . *Respondent*.

BOWLES, *Petitioner*; SAME, . . . *Respondent*.

TIERNEY, *Petitioner*; SAME, . . . *Respondent*.

TIERNEY, *Petitioner*;
LOPDELL and M'COOK, Assignees of
WILKINSON, *Respondents*.

(*Equity Exchequer.*)

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By an order of the 29th of January 1839, made in these matters, it was referred to the Remembrancer to inquire and report the priorities of the demands (if any) of the several petitioners, and the sums due to them respectively, for principal, interest and costs on foot of the judgment and proceedings in the petitions mentioned, under the 5 & 6 W. 4, c. 55, after all just allowances; charging the petitioners, *custodiam* and *elegit* creditors, with all sums which have been received, or which, without wilful default, might have been received, under or by virtue of the grants in *custodiam* or *elegit*; and that the Remembrancer should report the exact nature of the several encumbrances therein mentioned: and the periods particularly at which the funds fell due, and were received respectively, with reference to the dates of the several orders obtained in these matters; and how much of the said funds (if any) were applicable to each or any, and which of the several demands of the several petitioners respectively.

The Remembrancer made his report, dated the 1st of July 1840; and from it and the several orders made in these matters, the following facts appeared:—In Michaelmas Term 1813, William Gabbett obtained a judgment against the respondent Thomas Wilkinson in the penal sum of £300, late currency, to secure the sum of £150, with interest; and afterwards

The conditional order for the appointment of a receiver on a judgment, under the 5 & 6 W. 4, c. 55, is the order appointing the receiver within the meaning of that act, it being subsequently made absolute.

The order appointing or extending a receiver on a judgment attaches the arrears of rent then in the tenant's hands, for the benefit of the person obtaining it.

Tenant for life confesses a judgment,—is afterwards discharged as an insolvent—and then dies. The

Court has jurisdiction, under the 5 & 6 W. 4, c. 55, after his death to make absolute as against his assignees, a conditional order for extending a receiver, obtained in the lifetime of the insolvent, upon a petition against him, so far as to give effect to the lien of the petitioner on the life estate, and the rents received by the receiver thereout, and the purposes necessarily connected therewith.

Before the passing of the 5 & 6 W. 4, c. 55, a judgment creditor proceeded by *elegit* and inquisition, but was kept out of the possession of the estate by prior creditors. He afterwards obtained an order extending a receiver obtained on the petition of a prior creditor to the matter of his petition on his judgment:—*Held*, that he was entitled to the costs of his proceedings at law in the same priority with his demand.

A creditor by *custodiam*, on a judgment in a penal sum, obtained an order for the appointment of a receiver:—*Held*, that he was not entitled to interest beyond the penalty, which had accrued on the principal sum subsequent to the appointment of the receiver.

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died. His executors, in the year 1821, obtained a grant in custodiam of the lands in the petition mentioned, for payment of the sum due on foot of the judgment: and by deed of the 24th of June 1832, assigned the judgment and grant in custodiam to J. Barry, the petitioner in the first matter. J. Barry afterwards presented a petition under the 5 & 6 W. 4, c. 55, and obtained a conditional order for a receiver on the 4th of December 1835, which was made absolute by order of the 10th of February 1836. J. Barry died in September 1839, having by his will appointed three executors; of whom two, Thomas Barry and James Barry alone proved the will, and afterwards revived the proceedings.

In Hilary Term 1834, Richard Carey, the petitioner in the second matter, obtained a judgment against the respondent in the penal sum of £500; and in the year 1835, obtained a grant in custodiam of said lands: and having presented the petition in the second matter, he, on the 23rd of January 1836, obtained a conditional order for a receiver, which was made absolute on the 10th of February 1836, the day on which Barry's conditional order had been made absolute.

In Easter Term 1824, H. Bowles, the petitioner in the third matter, obtained a judgment against the respondent in the penal sum of £590; and in Easter Term 1825, obtained another judgment against the respondent in the penal sum of £400. In June 1826, he proceeded by *elegit* on foot of his judgments against the said lands: and having presented the petition in the third matter, he, on the 2nd of February 1837, obtained a conditional order to extend the receiver in the first and second matters to the third matter; which order was made absolute on the 11th of May 1837.

In Hilary Term 1826, E. Tierney, the petitioner in the fourth matter, obtained a judgment against the respondent in the penal sum of £520, and in June 1825 proceeded thereon by *elegit*: and having presented the petition in the fourth matter, he, on the 2nd of February 1838, obtained a conditional order to extend the receiver in the three first matters to the matter of his petition; which order was served upon the several petitioners in the first, second, and third matters. Thomas Wilkinson, the respondent, died in April 1838, before that conditional order was made absolute; whereupon E. Tierney, the petitioner in the fourth matter, presented the petition in the fifth matter to the Court, setting forth the proceedings which had been theretofore had in the matter of his petition; the death of Wilkinson; that he was but tenant for life of the lands in question; that in 1821 he had been discharged as an insolvent, and that Lopdell and M'Cook were his assignees; and praying that the proceedings already had might be continued as against Lopdell and M'Cook, and that the petitioner might be declared entitled to the benefit of those proceedings; and for that purpose, that the receiver already appointed might be extended to the matter of his petition.

By an order bearing date the 18th of June 1838, made in the five matters, it was ordered by the Court, that the proceedings in the fourth matter be continued against said Lopdell and M'Cook, assignees of the estate and effects of the respondent Thomas Wilkinson, so far as to give effect to the lien of the petitioner Tierney on the life estate of Thomas Wilkinson, and the rents received by the receiver thereof, and the purposes necessarily connected therewith, unless good cause should be shewn to the contrary in ten sitting days after service of this order, serving the order upon Lopdell and M'Cook, the assignees of Thomas Wilkinson, and on Dominick Lopdell, Charles Lopdell, and Margaret Lopdell—(these persons claimed an interest in the remainder, after the determination of the life estate of Thomas Wilkinson, in opposition to Thomas Kilner Wilkinson)—and upon Thomas Kilner Wilkinson, and on the executors of said Thomas Wilkinson (if any), and on the petitioners in the second and third matters.

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By another order of the same date, made in the three first matters, it was ordered, on the motion of the petitioner in the first matter, that the proceedings in the said several matters be continued, so far as to give effect to the liens of the petitioners on the life estate of Thomas Wilkinson, and for the purposes necessarily connected therewith, unless cause in ten sitting days after service of this order; serving the order on H. J. M'Cook and J. Lopdell, the assignees of Thomas Wilkinson, and on the several other persons mentioned in the order of equal date.

There was no personal representative of Thomas Wilkinson.

On the 29th of January 1839, the petitioner in the first matter moved that the conditional order of the 18th of June be made absolute, notwithstanding the affidavits of W. Roche and Richard Carey; and also that it be referred to the Remembrancer to inquire and report the priorities of the demands of the petitioners in these matters, and the sums due to them respectively for principal, interest and costs on foot of the judgments and proceedings in their several petitions mentioned; whereupon and upon reading the said conditional order, the affidavits, and the Accountant-General's certificate; and upon hearing counsel for the petitioner Carey, and also counsel for Tierney the petitioner in the fourth and fifth matters, who moved to make absolute the conditional order of the 18th of June last, notwithstanding the affidavit of R. Carey filed as cause against same: and upon reading the said order and affidavits, it was ordered by the Court, that the conditional order of the 18th of June, obtained by the petitioner in the first matter, be and it was thereby made absolute, subject to the directions therein and hereinafter mentioned; and that the date of the order of the 18th of June last, obtained by E. Tierney the petitioner in the fourth and fifth matters, be amended by making it bear date the 20th of June;* and that said conditional

* The reason for this part of the order was, that Tierney moved his motion on the 18th of June, without a petition; and the Court then made the order, directing a petition to be filed: which was not done until the 20th of June.

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order be and it was thereby made absolute, subject to the directions therein and hereinafter mentioned; and that the proceedings in the said several matters be continued so far as to give effect to the liens, if any, of the petitioners on the life estate of Thomas Wilkinson, and for the purposes necessarily connected therewith. The order then referred it to the Remembrancer to report the priorities of the several demands, as hereinbefore mentioned.

The report found that none of the petitioners were chargeable with wilful default, inasmuch as from the period of the grant in custodiam in 1821 to the appointment of the receiver, the lands were in the possession of other creditors of the respondent, whose demands were prior to the demands of the petitioners:—that there was due to the petitioners in the first matter, on foot of the judgment obtained by Gabbett, for principal, interest and costs, including the costs of the custodiam proceedings, and of the assignment, and their costs in these matters, the sum of £516. 14s. 7d. in case the Court should be of opinion that they were entitled to interest beyond the penalty of the judgment, from the 10th of February 1838; but if the Court should not be of that opinion, that then there was due to the petitioner the sum of £480. 0s. 10d. only, being the amount of the penalty and costs:—that there was due to R. Carey, on foot of his judgment, £460. 8s. 10d. for principal, interest and costs, including the costs of the custodiam proceedings:—that there was due to H. Bowles, on foot of his judgment of Easter Term 1824, £603. 19s. 6d. for principal, interest and costs, including the costs of his proceedings by *elegit*; and the sum of £416. 2s. 2d. on foot of his judgment of Trinity Term 1825:—and that there was due to E. Tierney, on foot of his judgment, the sum of £489. 14s. 3d. for principal, interest and costs, including the costs of his proceedings by *elegit*.

It further appeared, that there was received by the receiver, after deducting all expenses—

From the date of his appointment to the 2nd of February 1837	£233 19 9
From the 2nd of February 1837 to the 11th of May 1837	2 12 2
From the 12th of May 1837 to the 2nd of February 1838	601 13 9
From the 2nd February 1838 to the 29th of January 1839	422 18 8
From the 29th of January 1839 to the date of his last account	95 7 7
	<hr/>
	£1356 11 11
	<hr/>

Of this sum, there was received on account

Of the rent due the 1st of May 1836 and the 1st

of November 1836 £502 5 6

Of the rent due the 1st of May 1837 256 11 10½

Of the rent due the 1st of November 1837 286 18 0

Of the rent due the 1st of May 1838 310 16 6½

£1356 11 11

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The Remembrancer then reported how the funds should be allocated; first, in case the Court should be of opinion that the creditor obtaining an absolute order for appointing or extending a receiver under the act thereby became entitled, according to his priority, to all the rents which were received by the receiver out of the lands, after the making of such order; although the same were received on account of rents which became due previous to the making of such order: and secondly, in case the Court should be of opinion that the creditor obtaining such absolute order thereby became entitled to all the rents which accrued due by the tenants before the receiver should be extended to a subsequent matter; although the same were not received by the receiver until after he had been so extended.

Mr. *J. O'Brien*, for the executors of Barry, now moved that the special point reserved by the report as to the interest claimed by them, be ruled in their favour; and that they be declared entitled to have interest allowed them beyond the penalty of the judgment, from the 10th of February 1836 up to the date of the report, as thereby calculated; together with the interest since accrued thereon: that the other special points as to the costs of the *elegit* proceedings and the priorities of the demands of the petitioners in the second, third and fourth matters, be ruled as the Court shall deem fit: and for payment of the sum in bank, according to the rule to be made by the Court. At the same time, counsel for the petitioners in the other matters, moved that the money be paid according to the priorities which they respectively contended the petitioners were entitled to.

The first question debated on the motion was, whether the conditional order of the 2nd of February 1838, obtained by Tierney to extend the receiver to the matter of his petition, had been, in fact, made absolute by the subsequent order of the 29th of January 1839. The Court* were of opinion that it had in substance, though not in terms, been made absolute by the order of January.

Mr. *D. R. Kane*, and Mr. *Smith*, Q. C., for Tierney.

* BRADY, C. B., absent.

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The Court having decided that Tierney's conditional order to extend the receiver has been made absolute, the questions now are, first, whether the rents due by the tenants, but not collected by the receiver at the time when the order extending the receiver was made, are to be distributed as if that order had not been made; or are to be paid to the subsequent petitioners according to the priorities of their judgments: and secondly, if they are to be paid to them according to the priorities of their judgments, from what period is the order extending the receiver to have that operation.

1. The order extending the receiver attaches, for the benefit of the petitioner obtaining it, all rents which are due and uncollected by the receiver at the period it comes into operation. The object of the 5 & 6 W. 4, c. 55, in this respect, was to give the creditor a more speedy and beneficial execution than he theretofore possessed by writ of *elegit*: and in pursuance of that object, the 30th section provides that rents not received at the time an absolute order for appointing or extending a receiver upon the petition of a custodee is pronounced, shall be paid to the receiver: and the 33rd section enacts that in every order made for the appointment of a receiver, the tenants shall be required to pay him all rents due, or which shall thereafter become due by them. And although it has been held by this Court, that the order appointing a receiver does not attach the rents which had theretofore accrued due, and were still in the hands of the tenants; yet that leaves the present question, which relates to an order *extending* a receiver already appointed, wholly untouched. The 38th section, which directs how the rents are to be applied when the receiver has been extended, is conclusive in favour of Tierney's claim, so far as it relates to this question. It enacts that in case any sum *shall be received* before an order to extend the receiver to the matter of another petition shall be made, *the money so received* shall be distributed and paid as it would have been if such order had not been made: but in distributing the funds *thereafter to be received*, the Court shall have regard to the rights of the person at whose instance the order extending the receiver was made. The period of the receipt of the funds is that which determines how they are to be applied. *Bland v. Gould (a)*, and *Neate v. The Duke of Marlborough (b)* were referred to.

2. The rents are attached from the date of the conditional order, if it be afterwards made absolute. To hold otherwise would be to offer a premium to the respondent and to *puisne* judgment creditors who had obtained orders for a receiver, to litigate in a vexatious and wanton manner the appointment of a receiver on the petition of a prior judgment creditor. The act does not require that the Court shall, in the

(a) 1 Ir. Eq. R. 144.

(b) 3 My. & Cr. 407.

first instance, pronounce a conditional order. Whether it does so or not, is a matter of practice. It is said that the Master of the Rolls will give an absolute order to extend a receiver, in the first instance, if notice be given to the respondent; although he will only grant a conditional order to appoint a receiver. But the rights of the suitor ought not to be made dependent on the practice of the Court; and therefore, to remedy the mischief which would otherwise ensue, and to give the suitor in this Court the advantages which he would possess if he had sued in Chancery, the Court ought to hold that the absolute order extending the receiver has reference back to the conditional order, and attaches the rents and arrears from the time it was pronounced.

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Mr. Bennett, Q. C., and Mr. Cooper, Q. C., for Carey.

1. The Court has ruled that the conditional order of the 2nd of February 1838 was, in fact, made absolute by the order of the 29th of January 1839: but this question remains, whether the Court had jurisdiction to make the conditional order absolute, after the death of the respondent? We submit that it had not. The 31st section specifies the property over which the receiver is to be appointed. It is, all lands, tenements or hereditaments, which the creditor would be entitled to have extended or appraised under a writ of *elegit*. Could the lands be extended under an *elegit* after the death of the debtor, tenant for life? If not, neither could the Court appoint a receiver over them. Again, the 32nd section specifies the persons against whom the proceedings are to be continued on the death of the respondent. They are, the real or personal representative or representatives, or the assignee or assignees of such deceased party, or the person or persons in whom the interest of the deceased party has become vested, or who claim the same. But Wilkinson being but tenant for life, had no real representative; he died insolvent, and it is admitted that he has no personal representative: neither has he any assignee within the meaning of the act, nor is there any person in whom his interest is now vested; for it determined by his death.

[PENNEFATHER, B.—The assignees took the entire life estate of Wilkinson. The interest of the deceased party was the right to receive the rents which accrued in his lifetime; and that vested in his assignees. RICHARDS, B.—If the demands of the petitioners had been paid off, the assignees would be entitled to receive the uncollected rents.]

2. The order appointing or extending a receiver does not attach the arrears of rent in the tenants' hands. This act is framed with reference to proceedings by *elegit*, where the rents are attached from the date of the inquisition only. The 32nd section, which directs that the rents shall be applied according to the priority of each creditor, as ascertained

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by the date of the judgment, is strictly in accordance with the rule at law. If a *prius* judgment creditor issue an *elegit* and obtain a finding upon an inquisition, he is entitled to the rents until deprived of them by a prior judgment creditor; but the latter is only entitled to them from the date of his inquisition. So in proceeding under this act, the prior judgment creditor is only entitled to the rents from the date of the absolute order extending the receiver, which is substituted for the inquisition.—[PENNEFATHER, B. The Court is disposed to differ from you upon that point. We are inclined to be of opinion that when the conditional order is made absolute, it is to be considered as made absolute from its date, so as to attach the fund from that time.]—Suppose the *prius* creditor was paid between the dates of the conditional and absolute orders to extend the receiver, could the prior creditor recalc the money?—[PENNEFATHER, B. That question does not arise in the present case. It is a principle of equity, applicable to these orders, that a party seeking the assistance of the Court must use diligence. If he lie by and suffer the fund to be distributed, he loses his right.]—The conditional order is mere notice to the opposite party, calling on him to shew cause why an order of a particular nature should not be made. It stops nothing, and is wholly inoperative.—[PENNEFATHER, B. The conditional order is much more than mere notice. It is as if the Court had said, we would have made the order absolute in the first instance, upon the facts which have been laid before us, only that there may be some reason suggested by the parties in possession of the estate, why we should not: therefore, in tenderness to those persons, we will not make it absolute in the first instance. But that regard for the rights of those in possession ought not to be turned to the prejudice of him who seeks the intervention of the Court, if it should appear that there was no reason why the order should not have been made absolute in the first instance.]

3. The extending creditor is only entitled to the rents which accrued due after the order extending the receiver was made.

[The COURT said that it was not necessary to argue that question; for that it was the practice of the Court, settled many years since, that the order appointing the receiver should only attach the rents thereafter to become due.]

Mr. Hobart, for Bowles, cited *Anonymous*, (a) to shew that the order on the tenants to pay their rents to the receiver only applied to rents which accrued due after his appointment; and *Baker v. Pettigrew* (b), for the *dictum* of the Master of the Rolls, that the absolute order is the order appointing the receiver.

(a) 6 Law Rec. N. S. 133.

(b) 2 Ir. Eq. Rep. 144, 150.

Mr. Smith, Q. C., in reply.—1. As to the effect of a conditional order; it is an order *in presenti*, subject to be defeated on the performance of a condition subsequent, viz., if good cause be shewn against it. The order making it absolute shews, by its terms, that it is not a substantive independent order; for its language is that *the conditional order of the previous date* be made absolute. Its object is to shew that the condition subsequent has not been performed; and, therefore, that the first order is operative from the time it was pronounced.

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2. With respect to the jurisdiction of the Court to make the conditional order absolute after the death of Wilkinson :—[PENNEFATHER B.—The difficulty in this part of the case originated, not with Tierney, but with the petitioners prior to him. They ought to have made the assignees of Wilkinson parties to their original petitions; for the legal estate, affected by the judgments, was vested in them.* Wilkinson had no estate whatever in him.]—He would not have been a necessary party to a bill in equity relative to his estate. Therefore, the abatement in this case (as it has been improperly called) arose out of the death of a party who had no interest; and the amendment was merely formal.

3. The creditor is entitled according to his priority, to the arrears of rents which were in the tenants' hands, at the time the order extending the receiver was made. The practice which this Court has adopted upon this subject, is at variance with that in the Rolls Court, and does not appear to be warranted by the statute. But it is not necessary to over rule it in the present instance; for it only relates to orders *appointing* receivers, whereas the question here is with respect to the effect of an order extending a receiver already appointed. The 38th section is decisive upon the latter question; viz., that the rents are to be applied with reference to the periods at which they were received—not when they fell due. The language of the 33rd section is also confirmatory of this view of the question; and if it be not qualified by other parts of the statute, shews that the order appointing a receiver attaches the arrears of rent in the tenants' hands. Such a construction would be the most beneficial one for the debtor and creditor;—for the latter, because he would be sooner paid if the receiver be authorised to collect the arrears;—for the

* *Dunn, Assignee of Flood Petitioner v. Massey Respondent.*—Eq. Ex., T. T. 1840. This was an application to let lands in the possession of Payne. The petition was presented on foot of a judgment. It appeared that Payne was the alienee of the conuener, by a deed executed subsequent to the rendition of the judgment.

PENNEFATHER, B.,† refused to make the order; saying that the petition and orders thereon were wrong; for that the petition should have been presented against the person over whose estate the receiver was sought to be appointed.—Thursday July 2nd, 1840.

† *Solus.*

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debtor, because if the receiver be not so authorised, the arrears will in all probability be lost.

PENNEFATHER, B.—The questions, whether the absolute order takes effect from the date of the conditional order, and whether the order appointing or extending a receiver attaches arrears of rent due by the tenants but not received, are very important; and it is desirable that they should be discussed before the full Court. Therefore we think it better to let this motion stand until Wednesday next, when the LORD CHIEF BARON and Baron FOSTER, will be present in Court.

On Wednesday, December 2nd, the case was again argued at length before the full Court, by Mr. *Cooper*, Q. C., for Carey, and Mr. *Smith*, Q. C., for Tierney.

Mr. *Cooper*, Q. C.—1. The conditional order could not be made absolute against the assignees of Wilkinson after his death; for the assignees were not then assignees of any estate or interest Wilkinson had, it having determined by his death.

[BRADY, C. B.—Carey has continued his own proceedings against the assignees of Wilkinson, after the death of the latter: it is not competent for him now to make this objection. PENNEFATHER, B. The assignees took the entire of the life estate of Wilkinson, and are entitled to the rents which accrued due, though not received in his lifetime. They had that interest of the insolvent vested in them at the time when the conditional order was made absolute. Even if it were otherwise, we think that Carey, having revived his own proceedings against the assignees, cannot now sustain the objection.]

2. The absolute order does not refer back to the conditional, as has been contended. It is not an order, but merely notice that if the party does not shew cause, the Court will make an order to the effect mentioned in it. If it be the order extending the receiver, no money ought to be drawn out of Court, before it is made absolute, without notice to the extending creditor: and is the prior petitioner to be tied up until the subsequent petitioner obtains an absolute order?

3. But supposing the absolute order to have operation from the date of the conditional order, nevertheless it only attaches the rents thereafter to become due. The difficulty arises from the ambiguity of the words "thereafter to be received," in the 38th section. If the expression were "thereafter received," it would clearly embrace rents due before and received afterwards; but "thereafter to be received" means rents which thereafter became receivable. If a contrary construction be adopted, the receiver may collude with the subsequent petitioner, and give him an undue preference over the prior petitioner, by delaying to collect the rents.

Mr. *Smith*, Q. C., for E. Tierney.—The nature of what is here called a conditional order is more accurately expressed by the title given to it in England, namely, a rule *nisi*; that is, an order in *presenti*, to be defeated on the performance of a condition subsequent. As to the other question, the language of the 38th section is decisive: the first part of it would be wholly unnecessary, if the second petitioner is only entitled to the rents which accrued due after the order extending the receiver. The language of the 33rd section is also very precise, and bears strongly on the present question. It is said that the act was framed with reference to the rights of a creditor under his *elegit* and inquisition; by which he can only attach rents accruing due subsequent to the inquisition: but it is more reasonable to hold that the Legislature intended to give to the creditor rights beyond those he possessed at law. If the rents which have accrued due are not attached, the tenants will be harrassed by the receiver and the debtor proceeding at the same time against them; or the rents will be lost.—[PENNEFATHER, B. It is certainly a very important observation with regard to convenience, that the debtor should not receive the arrears, and the receiver the accruing rents. In framing the order appointing the receiver, the Court was influenced by the analogy between it and the inquisition on an *elegit*. RICHARDS, B. The decision of this Court in the *Anonymous* case (a) which has been cited, is not an authority upon the construction of the 33rd section: it was an application to amend the order on the tenants to pay their rents, by directing them to pay the receiver the arrears, as well as the accruing gales; which it was impossible to grant, so long as the order appointing the receiver merely authorised him to receive the accruing gales. The form of that order was originally settled by the Court without argument, though not without consideration. PENNEFATHER, B. The application in that case could not have been granted, for the reason mentioned by Baron *Richards*; but the counsel argued, and the Court decided it, upon the assumption that the order appointing the receiver was right in its terms. The form of that order was framed in analogy to the rights of a creditor under an *elegit* and inquisition; but perhaps the Court did not sufficiently attend to the very strong language to be found in the 33rd and 38th sections, or to the considerations of convenience, which, I agree, are very much in favour of the construction now contended for. I also believe that such is the true construction of the act.]

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The COURT said, that they were of opinion that the conditional order was the order appointing the receiver, it having been subsequently made absolute; and that the distribution of the funds in this case was to be made according to the words in the 38th section.

(a) 6 Law Rec. N. S. 133.

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Mr. Hobart.—Bowles is entitled to the costs of the *elegit* proceedings taken by him, in the same priority with his demand. He issued his *elegit* and obtained a finding before the 5 & 6 W. 4, c. 55, was enacted; but was kept out of possession by prior creditors.

Mr. Smith, Q. C., contra.—The party is not entitled to the costs of double proceedings. *Mahon v. Fitzgibbon (a)*; *Hudson v. Williams (b)*.

PENNEFATHER, B.—In *Hudson v. Williams*, the Court considered the proceedings at law wholly unnecessary. I think that Bowles is entitled to those costs.

RICHARDS, B.—In *Hudson v. Williams*, the proceedings by *elegit* were taken after the passing of the act: here the party had no option whether he would proceed at law or in equity, for a receiver had been appointed over the estate.

Mr. O'Brien.—Barry is entitled to interest beyond the penalty of his judgment. From the date of the order appointing the receiver on foot of his custodiam, he is to be considered as a custodiam creditor in possession; and is entitled to interest on the principal sum from that period. *O'Beirne v. M'Mahon (c)*.

Mr. Smith, contra, was stopped by the Court.

PENNEFATHER, B.

The custodiam was put an end to by the act; and when the custodes applied for a receiver, he came into this Court as a plaintiff, and is still a promovent. In *O'Beirne v. M'Mahon*, Lord Thomond was entitled to execute his *habere*, and applied for leave to do so; but the Court, to avoid disturbing the receiver, ordered him to pay to Lord Thomond one moiety of the rents, on the same equitable terms as if he had gone into possession.

The COURT, having ruled the several points in the principal case, conferred together; and the result of their consultation was announced by

BRADY, C. B.

The Court, after full consideration, are of opinion that the language of the 5 & 6 W. 4, c. 55, was not sufficiently taken into consideration in framing the order appointing the receiver; and that the words of the act ought not to be departed from. They are plain and intelligible.

(a) 2 Ir. Eq. Rep. 6.

(b) 1 Jones, 630.

(c) 1 Jones, 442.

Therefore, we direct the Officer to alter the form of the order appointing the receiver, so as to authorise him to receive the rents then in the tenants' hands.

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The following is the order pronounced by the Court :

Rule the special point made by the said report as to the interest claimed by the said Thomas and James Barry against them; and declare that the said Thomas and James Barry are not entitled to interest beyond the penalty of their said judgment; and accordingly declare them entitled to the sum of £400. 0s. 10d., and no more, in full for all demands on foot thereof. And rule the special point made by the said report as to the costs of *elegit* proceedings claimed by the said Henry Bowles and Edward Tierney in their favour; and declare that they are respectively entitled to the several sums of £56. 6s. 7d., £57. 14s. 3d., and £25 in said report mentioned, for the costs of the *elegit* proceedings taken by them on foot of their said several judgments; and that accordingly, the two several sums of £603. 19s. 6d. and £416. 2s. 2d., in said report mentioned, are due to the said Henry Bowles on foot of his two judgments therein mentioned; and that the sum of £489. 14s. 3d. in said report also mentioned, is due to the said Edward Tierney on foot of his judgment therein mentioned. And declare that the rights of the said Henry Bowles in respect of his said two judgments to the four several sums of £2. 12s. 2d., £601. 13s. 9d., £22. 16s. 8d. and £95. 7s. 7d., in said report mentioned, part of the funds in bank to the credit of these matters, and his lien thereon for payment of his said demand, are prior to the rights and claims of said Richard Carey thereto, in respect of his judgment in said report mentioned: and declare that the rights and claims of the said Edward Tierney in respect of his said judgment to the said two sums of £422. 18s. 8d. and £95. 7s. 7d., and his lien on the funds so in bank to the credit of these matters for payment of his said demand, are prior to the rights and claims of said Henry Bowles thereto in respect of the said judgment obtained by him in Easter Term 1825, being the second of his said judgments: and accordingly, that the Accountant-General do, out of the sum of £1356. 11s. 11d. cash now in bank to the credit of these matters of Barry petitioner Wilkinson respondent, Carey petitioner Wilkinson respondent, and Bowles petitioner Wilkinson respondent, draw in favour of said Thomas and James Barry, or their attorney lawfully authorised, for the sum of £480. 0s. 10d., being in full for their demands on foot of their said judgment; and let

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him also draw in favour of the said Henry Bowles or his attorney lawfully authorised, for the sum of £603. 19s. 6d., being in full for his demand on foot of the judgment obtained by him in Easter Term 1824, being the first of his said judgments; and let him also draw in favour of the said Edward Tierney or his attorney lawfully authorised, for the sum of £272. 11s. 7d., being the residue of said sum of £1356. 11s. 11d.; and which said sum of £272. 11s. 7d. is to be in part discharge of his said demand. No costs of the motions.

PIDGEON v. D'ALTON.

Nov. 4.

Dividends of small amount, which have accrued due on a sum of stock ordered to be transferred to a party, between the date of the order and the transfer of the stock, will be ordered to be paid to the attorney of the party who was authorised to accept the transfer. The application was made shortly after the transfer.

MR. ROLLESTON for Jane Anne Harte, a reported creditor in this case, moved that the Accountant-General do draw on the Bank of Ireland in favour of said J. A. Harte or Robert Maunsell her attorney lawfully authorised, and who received a transfer of the stock allocated to the said J. A. Harte, for the sum of £21. 14s. 5d., cash now in bank to the credit of this cause, being the July dividends which accrued due and became payable on the sum of £1241. 10s. 7d. old $3\frac{1}{2}$ per cent. stock at the price of the day on the 18th May last, transferred to the said J. A. Harte pursuant to an order to distribute the funds in this cause, dated the 6th of June 1840.

There was a similar application on behalf of R. J. E. Mooney, a reported creditor, for the sum of £8. 12s. 11d.

The common order is, that the money be paid to the party, or her attorney thereto lawfully authorised: but the Accountant-General will not under such an order pay the money to any person not named in it, unless a power of attorney to receive the sum mentioned in the order be executed to him. Here the sums of money applied for are dividends which accrued due between the pronouncing of the former order to transfer, and the time when that order was acted upon. They are small in amount; and the application is, that they be paid to the person who was authorised to accept the transfer of the stock, upon which they accrued; so that the expense of a new power of attorney may be saved to the party.

The COURT* granted the application.

* PENNEFATHER, B., and RICHARDS, B.

In the matter of the Rev. MUNGO NOBLE THOMPSON, *Petitioner*.
The Right Hon. RICHARD LALOR SHIEL, . . . *Respondent*.
And the Act of 1st & 2nd *Vict.* c. 109.

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(*In the Rolls.*)

Nov. 9, 11, 18.

THE petitioner was Rector of the parish of Templetuohy, and Prebendary of Kilbragh, in the diocese of Cashel and county of Tipperary, and as such Rector and Prebendary, was entitled to the tithe rent-charge in lieu of composition payable in respect of the titheable lands in the said parish. It appeared that on the 3rd of April 1824, pursuant to the statutes then in force, a composition for tithe had been duly established in this parish, and assessed and applotted upon the several titheable lands, and amongst others, the lands of Derravilla and Long Orchard, the estate of the respondent. By the 1 & 2 *Vict.* c. 109, a rent-charge equal to three-fourths of the composition was established in lieu of it, and by virtue of the said statute and of the previous applotment of the tithe composition, the said lands of Derravilla and Long Orchard, and the person having the first estate of inheritance or perpetual estate in them, within the meaning of the act, became liable to pay the annual sum of £56. 6s. 11d., part of the said rent-charge, in half-yearly payments, and it was accordingly paid by the respondent, who was the person so liable, up to and for the 1st of November 1839.

In June 1839, the following notice* was given in the usual manner:—
“Notice is hereby given, that it is the intention of the undersigned, who are charged with the annual payment of the sum of £3 each in respect of the rent-charge which has, by the statute 1 & 2 *Vict.* c. 109, become payable in lieu of the composition for tithes in the parish of Templetuohy, to make application to the Justices of the Peace at the ensuing Quarter Sessions to be held at Nenagh, in and for the county of Tipperary, on the 29th of June instant, to have the average price of wheat for the seven years preceding inquired of and ascertained, in order that such composition may be varied and diminished in proportion to such average, and the rent-charge payable in lieu thereof diminished in like proportion. 9th June 1839. William Bourke, Edmund Collier, Pat. Collier.” When the case came on at

Under 1 & 2 *Vict.* c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards in respect of the tithe rent-charge, and who have given notice in the manner specified by the act, Quarter Sessions may vary the rent-charge according to the price of corn.—An order reducing the rent-charge recited that
“Whereas
“due notice
“having been
“first by them
“given, three
“owners and
“occupiers of
“land in the
“parish of T.,
“&c., each
“charged with
“payment of
“£3 and up-
“wards in re-
“spect of the
“rent-charge
“payable in
“lieu of the
“composition
“for tithes
“made by cer-
“tificate of,

“&c., applied to the Justices of the Peace at Quarter Sessions,” &c. Afterwards, the Incumbent proceeded by petition under the 30th section of the act, to recover the rent-charge which accrued from the gale day after the order of Sessions, as if no reduction had taken place; and a rule *nisi* for a receiver having been obtained, the respondent came in to shew cause against it, relying upon the order of the Quarter Sessions:—*Held*, that the recitals in the order were not evidence of the facts thereby stated; and, as it now appeared that one of the three persons who signed the notice, and upon whose application the order was made, was not an owner or occupier of land in the parish, nor charged with payment of any portion of the rent-charge:—*Held*, that the Quarter Sessions had not jurisdiction, and that the order was a nullity.

* 1 & 2 *Vict.* c. 109, sec. 32, “And whereas the compositions for tithes by this act abolished, are liable to be increased or diminished from time to time, with reference

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Sessions, the petitioner attended and objected to the application being entertained, and insisted that the Justices had not jurisdiction to entertain it, inasmuch as the notice was not signed by three persons each charged with the annual sum of £3 in respect of the said rent-charge, as required by the act of Parliament; and he tendered witnesses to prove that Edmund Collier, one of the subscribing parties, was not a landholder, nor charged with payment of any portion of the rent-charge, as his lease had expired, and he had given up possession of the premises to the landlord, J. Cooper, Esq. several weeks before the date of the notice, and was in occupation merely as a paid caretaker. This fact as to Edmund Collier now appeared by the affidavit of Mr. Cooper, the landlord. However, the petitioner's witnesses were not examined at Sessions; and the Assistant Barrister having called for the applotment book, and having discovered that Edmund Collier was therein named as one of the tithe-composition payers to the amount of £3 and upwards for the said parish, overruled the objection to him, and thereupon, with the other Justices, made an order reducing the tithe-rent-charge, and reciting as follows :—

“to the average price of corn, as advertised in the *Dublin Gazette* during the preceding seven years, and it is just that the said rent-charges, which will, by virtue of this act, become payable in lieu of such compositions, and the amount whereof is regulated thereby, should be subject to a similar variation; be it therefore enacted, that it shall and may be lawful for any three or more persons in any parish or place, each charged with the annual payment of £3 or upwards, in respect of any such rent-charges, and for any party entitled to the receipt of such rent-charges, or any proportion thereof, respectively to make application for the increase or diminution of the composition in lieu whereof such rent-charges may be payable, at such periods from time to time, and in such manner as if he or they were liable to the payment or entitled to the receipt of such composition, he or they might respectively make such application: and the like notice of any such application shall be given, and all such and the like proceedings had thereupon, as by the provisions of the said several acts for establishing compositions for tithes in Ireland, authorised and directed in the case of application thereunder; and such composition shall be increased or diminished, and the applotment thereof amended accordingly, and the rent-charges payable in lieu thereof increased or diminished in the like proportion: provided,” &c. &c.

By Goulburn's Act, 4 G. 4, c. 99, s. 43, it was provided, that between 1st May and 1st October, in the third year after the 1st November from which composition shall have commenced (and so in every subsequent third year), the Incumbent or tithe-owners, “or any three or more owners or occupiers of land in such parish charged with payment of the sum of £3 or upwards each in respect of any such composition” (on notice given on two Sundays, the last being eight days previous to Sessions), may apply to Quarter Sessions to alter the amount of composition for the ensuing three years, in proportion to the average price of wheat or oats for three years preceding.

The 5 G. 4, c. 53, s. 23, and the 2 & 3 W. 4, c. 119, s. 6, altered the periods at which variation might be made, but did not in any respect alter the mode of proceeding to obtain it.

"By the Justices assigned to keep the peace in the county
"of Tipperary, at a general Quarter Sessions holden
"at Nenagh in and for the said County, on the 29th
"day of June 1839.

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"Whereas due notice having been first given by three owners and occupiers of land in the parish of Templemoyle, in the diocese of Cashel and county Tipperary, charged with the payment of the sum of £3 and upwards each, in respect of the rent-charge payable in lieu of the composition for tithes within said parish, made by the certificate of William Palmer and Patrick H. Tyrrell, bearing date the 3rd day of April 1824, in pursuance of the statutes in such case made and provided, they applied to the Justices of the Peace at the Quarter Sessions above-mentioned to have the average price of wheat for the seven years last preceding inquired of and ascertained," &c. (following the terms of the notice): "and whereas the said applicants and the Rev. Mungo Noble Thompson, Rector and Vicar of said parish, having appeared before the said Justices at such Quarter Sessions, the certificate of composition for all tithes rectorial and vicarial within the said parish, bearing date the 3rd day of April 1824, and the *Dublin Gazette* for the seven years now last preceding were produced and proved; and whereas it appeared that the average price of wheat stated therein," &c.—accordingly ordered and adjudged, that the rent-charge should be reduced in proportion to the difference between the average price of corn for the last seven years, and the average price stated in the certificate of tithe-composition.

The petitioner protested against the foregoing order, and was advised that it was invalid, as the notice was a nullity, and the matter *coram non iudice*; it was, however, recorded in the Diocesan Court, and when the half year's rent-charge payable on the 1st of May 1840 was demanded at the old rate, the respondent refused to pay it, but offered to pay it at the reduced rate. Accordingly, for the purpose of raising the question, the petition in this matter was presented in the usual form under the 30th section of 1 & 2 *Vict. c. 109*, for a receiver over the lands of Derravilla and Long Orchard or a competent part of them to pay the sum of £28. 5s. 6d., being the half year's rent-charge (at the old rate) due on the 1st of May 1840, &c.; and a conditional order having been obtained, the respondent now came in to show cause against it.

The *Solicitor-General*, and Mr. J. H. Blake, Q. C., for the respondent.—The order of the Court of Quarter Sessions must be conclusive in this case: every thing within it was within the jurisdiction of the Court; it is in all respects regular upon the face of it; and it is a general rule that every thing is to be presumed in favour of the

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order of Justices. The question, whether there was due notice, was a question for the Justices; their attention appears to have been particularly called to it, and accordingly, they, having full jurisdiction so to do, distinctly adjudicated upon it. This is not a Court of appeal from the Quarter Sessions; and we submit that the order on which we rely, which is a judgment *in rem*, pronounced by a Court of Record of competent jurisdiction, and in the presence of the petitioner who was a party to it, is not examinable in this Court, and must be conclusive in the present case: *Phillipps on Evidence* (a); *Rex v. Justices of Monmouthshire* (b); *Rex v. Carlisle* (c); *Herbert v. Cook* (d); *Duchess of Kingston's case* (e).

Mr. Brewster, Q. C., and Mr. Smith, Q. C., for the petitioner.—The Court of Quarter Sessions has no jurisdiction to reduce tithe composition or the rent-charge payable in lieu of it except under the 1st & 2nd Vict. c. 109, which refers back to the 43rd section of G. 4, c. 99 (Goulbourn's act); and these statutes give such jurisdiction only in the event of three or more persons charged with the payment of £3 or upwards, on account of the rent-charge, giving due notice in the manner specified, of their intention to apply to the Quarter Sessions for a reduction of the rent-charge according to the average price of corn. It now indisputably appears that there was not in this case the notice required by the acts of Parliament, and without which the Assistant Barrister's Court had no jurisdiction whatever in the matter. It is quite true, that when by law a Court has jurisdiction in the matter upon which it adjudicates, its judgment whether right or wrong is, until reversed, conclusive as to the subject matter between the parties, and is not examinable in a collateral proceeding; but a recital in an order of the Court, of facts necessary to give jurisdiction is not evidence of such facts, nor that the Court had jurisdiction: and it is clear in principle and upon authority that the Court cannot, by a false recital in its order, give itself a jurisdiction which the law has not entrusted to it: *Rex v. Gilkes* (f); *Welch v. Nash* (g).

MASTER OF THE ROLLS.

The question in this case is substantially as to the validity of an order of the Court of Quarter Sessions for the county of Tipperary, made in the month of July 1839, reducing the rent-charge in lieu of tithe composition for the parish of Templeuoehy in that county, of which the

(a) 8th Ed. pp. 506, 525.

(b) 8 Bar. & Cres. 137.

(c) Bar. & Adol. 362.

(d) 3 Doug. 101.

(e) Smith's Leading Cases, 439.

(f) 8 Barn. & Cres. 439.

(g) 8 East, 394.

petitioner is Rector. Upon the one side, it is insisted that under the circumstances, this order is absolutely void: and it is argued upon the other, that as it is an order of a Court of Record, formal in all respects, and shewing, or appearing to shew, upon the face of it the jurisdiction of the Court, it is not examinable in a collateral proceeding, and until reversed must be conclusive between the parties.—It is necessary to consider the nature of the jurisdiction said to have been exercised in this case.

By the 43d section of 4 G. 4, c. 99, it was enacted that it shall be lawful for the Incumbent or other person entitled to the composition “or for any three or more owners or occupiers of land in such parish charged with payment of the sum of £3 or upwards each, in respect of any such composition, to cause a notice in writing signed by such Incumbent, (&c. &c.,) or by such owners or occupiers of land to be affixed (&c.) signifying that it is the intent of such Incumbent (&c.,) or of such owners or occupiers of land, to make application to the Justices of the Peace at such Quarter Sessions in order that such composition may be varied;”—“and it shall be lawful for the person or parties by or on whose behalf such notice shall have been so given to make such application: and thereupon it shall be lawful for such Justices,” &c. &c. The 1 & 2 Vict., c. 109, substituted in lieu of tithe composition, a rent-charge equal to three-fourths of it, and, by the thirty-second section, after reciting that compositions might be varied, enacted “that it shall and may be lawful for any three or more persons in any parish or place, each charged with the annual payment of £3 or upwards in respect of any such rent-charges, and for any person entitled to the receipt of such rent-charges, or any proportion thereof respectively, to make application for the increase or diminution of the composition in lieu whereof such rent-charges may be payable, at such periods from time to time and in such manner as, if he or they were liable to the payment or entitled to the receipt of such composition, he or they might respectively make such application: and the like notice of any such application shall be given, and all such and the like proceedings had thereupon, as by the provisions of the said several acts for establishing compositions for tithes in Ireland, authorised and directed in the case of application thereunder.”—The order to which the present question refers, purports to have been in pursuance of the sections just mentioned; and it is plain that those sections do not give to the Court of Quarter Sessions any jurisdiction to make such an order of its own mere will and pleasure, nor upon an application without notice, nor on the application of strangers: the jurisdiction is specially limited to the case of an application by such persons and upon such notice as are particularly specified and required by the acts of Parliament. It may also be observed that the 1 & 2 Vict. is more stringent than the 4 G. 4, as to the qualification of the parties competent

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to give the notice and make the application ; for the 4 G. 4 made it competent for any three owners or occupiers of land in the parish, charged with payment of £3 each in respect of the tithe composition, to give such notice ; whereas the 1 & 2 Vict., which substitutes in lieu of the composition a rent-charge less by one-fourth, requires that the persons giving the notice shall be persons each charged with payment of £3 in respect of the rent-charge.

In the present case, it appears indisputably that one of the persons who signed the notice, and upon whose application the order was made at the Quarter Sessions, was not a person charged with payment of any portion of the rent-charge ; so that there was a failure of the condition which the statute has made necessary and precedent to the jurisdiction of the Justices. But it is said, that the question whether there was due notice or not, was properly a question for their consideration, and that having adjudicated upon it they made their order, which, it is admitted, is in all respects regular upon the face of it. I think, that where Justices of the Peace at Sessions pronounce an order in the exercise of a clear jurisdiction, every intendment is to be made in its favour, and, if regular in form, it will be conclusive between the parties and those deriving under them, until reversed or set aside. But it must clearly appear that the Magistrates had the jurisdiction which they affected to exercise. In the case of *Rex v. Inhabitants of Chiltern-coton* (a), Lord Kenyon said "It should appear on the face of the order that the Justices who made it had jurisdiction : if they had jurisdiction, every fair presumption will be made that they decided rightly ; but if they had not, the proceeding is a nullity." In *Basten v. Carew* (b), Abbot, C. J., pronouncing judgment observed, "It is a general rule and principle of law, that where Justices of the Peace have an authority given to them by an act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done."

In *Groenvelt v. Burwell* (c), Lord Holt laid down the general rule that a man convicted by a competent tribunal cannot, in a collateral proceeding, traverse the fact of which he is convicted ; and the jurisdiction clearly appearing, the judgment is conclusive as to all matters determined by it. But the question here is—not whether as to such matters the judgment of a competent jurisdiction is conclusive,

(a) 8 Term R. 178.

(b) 3 Bar. & Cress. 652. See *Annette v. Osborne*, 2 Ir. Law Rep. 317 ; *The Queen v. Pickering*, 1 Ir. Law Rep. 298.

(c) 1 Ld. Raym. 466-7. See, also, *Gahan*, in *Error, v. Maingay*, Ir. T. R. by Ridgw. L. & S. p. 20.

but—whether recitals in the order of an inferior Court are conclusive evidence *that it had jurisdiction*? If this were so, it is plain there might be a lawless usurpation of authority without any sufficient means of preventing or checking it. No such doctrine is to be found in the books: on the contrary, it is well settled, that the order of Justices, or the judgment of any foreign or inferior Court is examinable as to the matters touching its jurisdiction; and if it appears that there was not jurisdiction, the proceeding is absolutely void. Thus in the case of *Welch v. Nash* (a), the defendant justified an alleged trespass, for that the *locus in quo* had been and still was a public carriage highway, &c. Upon the trial, a question arose upon an order of Justices at Sessions, to whom by act of Parliament authority was given in certain cases to order old highways to be stopped up *when* new ones were opened. It appeared that in the supposed exercise of this limited jurisdiction, the Justices made an order, which upon the face of it seemed to be regular and within their jurisdiction, that the highway in question should be stopped up and the ground vested in the plaintiff by way of compensation for part of his land, given by him for a certain new and more commodious highway, which the order stated to have been made, and it further stated that the Justices had *viewed* the old and new highways *and that the new highway was then open and ready for travellers*. It further appeared that this order was confirmed upon appeal by the Court of Quarter Sessions, which had authority by the act of Parliament to hear and finally determine appeals from orders at Sessions in such matters. The defendant's case was, that the Justices had not jurisdiction; as a new highway had not been opened nor set out when the old one was stopped up; and evidence was admitted, subject to the opinion of the Court above as to its admissibility, to shew that what was denominated a *new* highway in the Justices' order was in fact an old highway which had been repaired at the plaintiff's expense, and widened in certain parts by patches of the plaintiff's land. The question as to the admissibility of this evidence then came before the Court upon a case fully stating the facts, and the plaintiff's counsel insisted that the order of the Quarter Sessions on appeal was conclusive and could not be questioned; and it may be observed, that nearly the same line of argument as has been taken by the counsel for the respondent in the case now before the Court, was open to the plaintiff's counsel in *Welch v. Nash*. But Lord Ellenborough, C. J., said, "This is a question of jurisdiction: the magistrates have only jurisdiction conferred on them in a given case.—" "Increasing the width of one old highway is neither *diverting* another old highway, nor making a *new* one; and the Justices cannot make facts by their determination, in order to give to themselves jurisdiction, contrary to the truth of the case." And Lawrence, J.

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(a) 8 East, 394.

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said, "The Justices cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not the fact." Accordingly the verdict was entered up for the defendant. So, in *Rex v. Gilkes* (a), there was an indictment against the stewards of a benefit society for disobeying an order of Justices to whom authority was given by the act of Parliament under which such societies were established, to make the order in question, provided the rules of the society had been allowed and confirmed at Quarter Sessions; and in the order it was recited, that "it appeared to the Justices, that the said rules, orders and regulations have been allowed and confirmed by the Justices of the Peace for the county of Middlesex at the General Quarter Sessions," &c. At the trial, the order of the Justices set out in the indictment was given in evidence for the prosecution, and no other evidence than the recital in that order was offered upon either side, of the fact that the rules of the society had been enrolled at Sessions; and upon such evidence the jury was directed to find a verdict of Guilty, but liberty was reserved to the defendants to move to enter a verdict of acquittal. A rule nisi having been obtained, the counsel who came in to shew cause against it pressed the argument, which we have heard in the present case, that the order of the Justices was regular upon the face of it, and that every intendment was to be made in its favour; but Lord Tenterden, C. J., pronouncing judgment, said, "In order to shew that an offence was committed in this case, it was necessary to make out that the order was one which the magistrates had authority by law to make. They had no such authority, unless the rules of the society of which the defendants were members had been enrolled at the Sessions. That fact it was necessary to substantiate by legitimate proof. The recital in the order of Justices, that the rules had been enrolled, was not, as against the defendants, legal evidence of that fact." Accordingly, the rule for entering up the verdict of acquittal was made absolute. That decision goes much farther than the petitioner in this case has occasion to contend for;* as it would appear from it, that where the order of a limited jurisdiction is pleaded against a party, it is not merely competent to him to dispute the facts which were necessary to originate the jurisdiction, but, the recital of such facts in the order is not, as against him, to be taken even

(a) 8 Bar. & Cres. 337.

* *Rex v. Gilkes*, it will be remembered, was the case of an indictment, which possibly might be considered as implying some limitation upon the effect of the decision; but if it is to be taken as establishing a general rule of evidence, it would follow that in a case of this kind the respondent should shew by affidavit that notice of application to the Quarter Sessions was given on two Sundays and in the manner required by the 4 G. 4, c. 99, s. 43;—that such notice was signed by and upon behalf of three or more persons each of whom was charged with payment of £3 in respect of the rent-charge;—and that upon their application according to such notice, the order was made.

as *prima facie* evidence of their existence: they must be clearly proved. *Buchanan v. Rucker* (a) shews that in an action of *assumpsit* upon a foreign judgment, it must not only appear that the foreign Court had jurisdiction as to the subject matter, but also that the defendant was within or liable to the jurisdiction and had due notice of the proceeding: Lord Ellenborough there said, "as nothing was in proof to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an *assumpsit* in law upon the judgment so obtained." *Williams v. Lord Bagot* (b) is a case establishing the same general principle, that where it clearly appears that the judgment or order of the inferior tribunal exceeded its legitimate authority, as in the case of giving judgment against a man who did not appear to have had any notice of the proceeding, the superior Court will not give effect to such judgment.

In the recent case of *Rogers v. Browne* (c), in the Court of Exchequer in this country, there was a question of pleading,—whether a party justifying an alleged trespass under the judgment of an inferior Court, is bound to set out in his plea the precise nature and extent of the jurisdiction, and to shew, that in the action in the inferior Court, the defendant was summoned before the attachment issued? Baron *Pennycuik* decided that, according to the modern authorities, such particularity is unnecessary; but he said, "It is averred in the pleading, that the cause of action arose within the jurisdiction of the Court of Youghal. This is a material allegation, and offers a material issue for parties to go to trial upon, if the law and justice of the case permit a defendant to traverse the fact of the jurisdiction in such a case at all; upon which point I beg to be understood as giving no opinion whatsoever." That decision, therefore, cannot be considered as questioning the general principle of the decisions to which I have already adverted; and that it was not so intended appears from the subsequent decision in *Lessee of Coffey v. Rahilly* (d). That was an ejectment on the title; and upon the trial, the lessor of the plaintiff proved a lease of the premises from the defendant to one Fitzpatrick, bearing date the 28th of April 1814, for three lives or sixty years, one of which lives was still in existence, and under this lease the lessor of the plaintiff derived his title. The defendant gave in evidence a decree of the Quarter Sessions upon a civil bill, brought by him to recover, against Fitzpatrick, the premises, for desertion, under 56 G. 3, c. 88; but the decree stated that Fitzpatrick held the premises—not under the

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(a) 9 East, 192.

(b) 3 Barn. & Cres. 772, 5 D. & R. 719. See, also, 1 Stark. 525; 2 B. & Ad. 951; 3 Ves. 170; 2 Russ. 206; 4 Jacob, 184; 8 Sim. 308.

(c) Hayes, 487.

(d) 3 Law Rec. N. S. 193.

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lease of 28th April 1814, then in evidence, but—under an accepted proposal for a lease for three lives or sixty-three years, dated the 2nd of October 1812; and this proposal was also given in evidence, and the fact of desertion was proved. It was then insisted that the decree *did not truly state* the nature of the tenancy, as required by the statute, and, therefore, was not evidence against the title of the lessor of the plaintiff; and the point having been reserved for the opinion of the Court, it was held that the decree was invalid, *as it did not truly describe the tenancy*; and accordingly, the verdict was entered up for the plaintiff. It is therefore clear that the Court of Exchequer would not hold recitals in the judgment of an inferior Court to be conclusive as to facts material to the jurisdiction; and that as to such facts, it would allow the record to be falsified by the party sought to be affected by it.

In the case of *Pigott v. J'Anson (a)*, the question was as to the effect of a document which was proved in the Ecclesiastical Court as a testamentary schedule, and the probate of which was read in evidence in the cause. The Court was of opinion that it was an act *inter vivos*, and not testamentary; but the parties who relied upon it as a revocation of a former will, insisted that, the Ecclesiastical Court having proved it as a testamentary schedule, this Court was bound to treat it as such: to which the Lord Keeper answered—"I know of no such rule. If an "instrument comes before me which appears to be *not* an act *inter vivos*, in "order to found a decree upon it as a testamentary act, it must be proved "in the Spiritual Court. But if they prove there what is an act *inter vivos*, "this Court will consider the probate as void, and *coram non judice*."—Thus clearly recognising the distinction between an order where the jurisdiction is unquestionable, and an order exceeding the legitimate authority of the Court; and adopting the conclusion, that where the jurisdiction is defective, the judgment which is conceived by it must be still-born, and alike incapable of conferring any right, or creating any obligation. The only other case to which I shall now advert, is that of the *Attorney-General v. Lord Hotham (b)*, which perhaps comes nearest to the present. The question in that case turned upon the validity of proceedings by Commissioners, appointed by act of Parliament for the purpose of dividing and inclosing the commons and waste lands in the parishes of East and West Moulsey, and empowered to hear and determine any dispute which might arise between parties interested in such division and inclosure; but the act provided that nothing therein contained should enable the Commissioners to determine the title to any messuages, &c., or to determine any right contrary to the possession of parties, except in cases of encroachment within twenty years; and it gave an appeal from the proceedings of the Commissioners to the Quarter Sessions, provided the same should be made within two

(a) 1 Eden, 469, 471.

(b) 1 Turn. & Russ. 218-19.

months next after the cause of complaint should have arisen. It appeared that for a period greatly exceeding twenty years next before the proceeding of the Commissioners, the parish was and had been in undisturbed possession of the lands in question, and exercised over them an undisputed right of absolute ownership; but it also appeared that the manor of East Moulsey was the property of the Crown, and for a long series of years prior to the possession by the parish of the lands in question, that the Crown had been in possession of them as part of the common or waste lands belonging to the manor; and the defendant having lately purchased the manor from the Crown, the Commissioners allotted to him the lands in question. Against this allotment, the parish did not appeal within the two months limited by the act, and the defendant insisted that, therefore, the proceeding of the Commissioners must be conclusive in this Court. Sir Thomas Plumer, M. R., said :—"The second part of the case made by the defendants is, "that the act of Parliament gave the Commissioners jurisdiction to decide "the question with respect to these lands, but I am clearly and decidedly of opinion that they had no jurisdiction at all; it follows as a "matter of course, if they had no jurisdiction that their decision is a "nullity; *it does not create any necessity for an appeal, where a limited "tribunal takes upon itself to exercise a jurisdiction which does not belong "to it; if it decides upon matters with respect to which it has no authority, "its decision amounts to nothing, and no party can in the least be bound "by it.*" The case was afterwards brought upon appeal before Lord Chancellor Lyndhurst (a), who adopted the reasoning of the Master of the Rolls and confirmed his decision. Between that case and the present there seems to be little difference, other than that, there, the limited authority was given to Commissioners, and here, to Justices of the Peace at Quarter Sessions; but the case of *Welch v. Nash* (b) shews clearly that where a limited authority is given by act of Parliament to Justices of the Peace at Sessions, it cannot have any other or greater force or operation than it should have if given to Commissioners appointed by the act.

I understand that the proceedings in this matter have been instituted merely for the purpose of taking the opinion of the Court respecting the order of the Quarter Sessions, and that the respondent is willing to discharge at once the petitioner's demand, when the legal objection is disposed of. Therefore, I presume that, if the parties are satisfied with my judgment, this matter will proceed no further; however, for the reasons I have stated, the form of my order must be, that the cause shewn be disallowed, and that the conditional order for a receiver be made absolute.

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(a) 3 Russ. 415.

(b) 8 East, 394.

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26 & 27.

BARRY v. STAWELL.

(In Chancery.)

Where costs were decreed to be paid by a plaintiff to a defendant who died after the decree and before the costs were taxed, and his administrator issued a summons to tax the costs, upon which the solicitor for the plaintiff attended, and protesting against the right of taxation, reduced the items in the bill, and made no application to the Court within a period fixed by the Master for that purpose; *Held*, that a subpoena to compel the payment of those costs was not irregular.

Where one of several defendants dies after decree, and the cause is still in operation between the plaintiff and the other defendants, the right to costs decreed to a defendant, is not affected by the death of the party decreed them, before taxation.

THIS was an appeal from the order of the Master of the Rolls refusing the application to set aside the subpoena for costs, which had been issued by the representatives of William Wise, who had been made a defendant to the bill, and against whom the bill had been dismissed with costs, and who had died before the costs were taxed.

[The facts of the case and the argument on both sides are so fully stated in Mr. *Stoker's* report of the case at the Rolls* that it is deemed unnecessary to repeat them here.]

The *Attorney-General*, and Mr. *Collins*, Q. C., appeared for the plaintiff.

Mr. *Warren*, Q. C., and Mr. *Jenkins*, for the administrator of the defendant *Wise*.

In addition to the authorities cited in the argument for the plaintiff at the Rolls which will be found in Mr. *Stoker's* report, the following authorities were relied on by the counsel for the appellant; *Anonymous* (a); *Dodson v. Oliver* (b); *Delaval v. Blackett* (c); *White v. Hayward* (d); *Kemp v. Mackarel* (e); *Hall v. Smith* (f); *Edgell v. Brown* (g); *Mitford on Pleading* (h); *Fenner v. Fenner* (i); *Lowten v. Mayor of Colchester* (k).

On the part of the respondent it was contended that the jurisdiction as to costs in equity did not rest on any common law analogy, or on any statute. That the statute which first gave costs in equity (l) gave the Chancellor power to award them only in cases "of writs founded on untrue suggestions, where such suggestions were duly found and proved untrue," which Lord Coke (m) says, did not extend to a demurrer in law upon a bill, but upon hearing a cause. That the 15 H. 6, c. 4, provided that no writ of subpoena should be granted thenceforth "unless security should be found to satisfy the party grieved thereby, his damages and expenses of the matter contained in the bill could not

(a) 2 Eq. Ca. Ab. 3.

(c) Barn. 65.

(e) 2 Ves. sen. 579.

(g) 1 Dick. 62.

(i) 10 Ves. 572.

(l) 17 R. 2, c. 6.

(b) Barn. 161.

(d) 2 Ves. sen. 461.

(f) 1 Bro. C. C. 437.

(h) p. 202.

(k) 2 Mer.

(m) 4 Inst. 83.

* Ante, p. 18.

be made good, a provision which the Court had altogether disregarded. That the statute which authorised Courts of Law to give costs upon a demurrer (the 9 *W. 3*, c. 11, *Ir.*, analogous to the 8 & 9 *W. 3*, c. 11, *Eng.*) gave the party for whom the judgment should be given upon demurrer his costs, as if judgment had been given upon a verdict, and yet Courts of Equity both before and since the passing of these statutes in both countries gave only £5 costs to the successful party upon a demurrer (a), a practice that continued until the introduction of the New Rules. *Taylor v. Popham* (b), *Harmer v. Harris* (c), and *Gilbert* (d), were also relied on.

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The LORD CHANCELLOR at the close of the argument delivered the following judgment.

I shall state the grounds upon which I concur in the decision of the *Master of the Rolls*. I have read carefully the judgment which he pronounced upon this case when before him, and it appears to me to be a most able and satisfactory argument upon the subject, and I do not think it fair to impute to his Honor, because he has been anxious to do justice, and seek for a distinction that would take the case out of a rule that prevents him from doing so, the presumption of deciding in opposition to the decisions of preceding Judges, upon his own authority. In my opinion his judgment is not liable to any such imputation, and in affirming his judgment I do not think that such an imputation attaches upon me.

The *Master of the Rolls* has accurately examined all the authorities, he has minutely gone into the several cases in which distinctions have been established by successive Judges—endeavouring, and in my opinion wisely endeavouring, to withdraw each case from the operation of the rule. His Honor, in his judgment states his objections to the general principle—objections which have pressed upon the mind of every successive Judge who has had to decide on the subject—and adds that in his opinion (an opinion in which I fully concur), the Court, instead of seeking to evade the rule, by establishing distinctions, withdrawing each particular case from its operation, would have acted more wisely in directly overthrowing the rule itself, a rule by which they had imposed fetters on themselves, the inconvenience of which they had on all occasions admitted. The *Master of the Rolls* has also stated his anxiety—an anxiety which every Judge must feel—to find a distinction that would enable him to do justice. I will not go into all the authorities that have been cited. In addition to the arguments of the *Master of the Rolls* and of the counsel for the respondent, I shall state three or

(a) Har. Ch. Pr. 210.

(b) 15 Ves. 576.

(c) 1 Russ. 157.

(d) For. Rom. 181.

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four reasons upon which I rest my judgment: First, this cause is still in full effect and operation, and therefore if the party had applied for liberty to file a bill of revivor for the purpose of obtaining payment of those costs—a bill which it is admitted would have been open to a demurrer—he would have applied for what was totally unnecessary. The objection in point of form to the proceedings of the respondent here is not merely so; it is not quite accurate to state it as an objection in point of form, it is an objection which goes to the argument that a revivor is not necessary. The only authority precisely applicable to the present case is the decision in *Averall v. Wade* (a), and certainly that case cannot be in any respect distinguished from the present, and if I were to adopt it, it must be admitted that it would govern the present. Now, no man has a higher respect for the late Master of the Rolls than I have, but nevertheless I cannot adopt his decision in that case. I have already stated, in a former case, that I did not consider myself bound by that authority. In *Beytagh v. Concanen* (b), I decided the case principally upon the ground that the cause was in full operation. In the course of the argument in that case, the decision in *Averall v. Wade* was pressed upon me, and in my judgment I stated that I did not consider myself bound by its authority. It is in my opinion most natural for the Court, when dealing with a technical rule which works injustice, to exhibit an anxiety to decide the case in such a manner as to do justice to the parties, and to struggle to escape from authorities which establish a position, that completely prevents the Court from deciding according to the plain and manifest principles of justice. If in seeking to get rid of a rule of this description, a just and laudable anxiety has been manifested by the Court to find a distinction that might enable me to do justice, I do not think I am guilty of the presumption of setting up my own judgment (the judgment certainly of a person of inferior capacity and attainments) in opposition to the decisions of the many eminent Judges who have decided upon questions of the like nature to that now before me. Now, the case of *Johnson v. Peck* (c), the case of *Kemp v. Mackarel* (d), the case of *Blower v. Morritt* (e), and the passage which has been read from *Gilbert*, in my opinion fully justify me in saying, that when the cause is in operation, when any thing remains to be done—no matter whether between the same or between other parties—in such a case there is no necessity for filling a bill of revivor, in order to entitle the representatives of a party who has been decreed his costs, and has died before they were taxed, to obtain payment of them. It is not setting up my own authority in opposition to that of the Judges who decided these cases, but acting

(a) 1 Mol. 571.

(c) 2 Ves. sen. 465.

(b) Ll. & G. Cas. temp. Plunket, 355.

(d) 2 Ves. sen. 579; S. C. 3 Atk. 811.

(e) 3 Atk. 773.

in conformity with them, to decide, that when something remains to be done in a cause between any of the parties, there is no necessity for a revival of that cause between the party who is to pay the costs and the party who is to receive them, in order to enable the Court to enforce payment of costs actually decreed. Here the cause in which this decree was made is not only in actual operation between other parties, and orders made in it in which those other parties are interested, but it is acted on by the plaintiff himself, and he seeks the benefit of that very decree which imposes on him the duty of paying those costs, by applying for an order to draw out of Court the fund which that decree entitles him to. If that fund were now in Court, it would be applicable to the payment of those costs, and the Court would never permit it to be paid out to the plaintiff, without compelling him to pay the costs which the decree that entitles him to it directed that he should pay. What then is the state of facts actually existing? The plaintiff applies to the Court to be permitted to draw the fund out of Court and apply it in payment of his demand; that application is opposed by the very parties against whom this motion is made; and they say to the Court, "Do not permit this fund to be drawn out, because we are entitled to costs under the very decree which gives it to the plaintiff, and those costs are not yet taxed; so that we are unable at present to apply for payment of them." But the Court says, "No, the plaintiff shall not be prevented from drawing out the money because you have an unascertained demand; but no injury shall be done to you, because the payment shall be made without prejudice to the rights of the parties." If the costs had been taxed at the time, and the party applied for an order that the plaintiff should not draw the money without paying the amount of them, how could such an application have been resisted? and as that payment was made by Court expressly, without prejudice to the rights of the parties, I consider the case exactly in the same position as if, now that the costs are taxed, the plaintiff were applying to draw the money out of Court.

I think also, what occurred at the taxation of those costs not immaterial to the present case. The representative of the party to whom they are decreed goes before the Master, and desires that they should be submitted to the Master's taxation; the plaintiff's solicitor is present at the taxation, and he objects to the right to have them taxed at all; he ought then have relied on that objection; he does not do so however; but protesting against the right of taxation, he objects to the items of the bill of costs, and some of these objections are allowed. He still, however, objects, before the Master, to the right of having the costs taxed at all; and the Master says, "I will give you the benefit of your objection, if you avail yourself of it in proper time; apply to the Court during the present Term." He does not do so—he makes no application to the Court during that Term; and then it is said, that

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the defendant ought to have proceeded to enforce the payment, and that the plaintiff was not bound to take any step until the defendant did so; but, in my opinion, that is not so: the defendant was not bound to take any step.

Looking, then, to all the circumstances of this case, if this Court be not deprived of its inherent jurisdiction, which enables it to prevent a party from gaining any advantage by his own misconduct, and to compel a party seeking the benefit of any decree, to give the benefit of it equally, to a party who is equally entitled to it, the present is a case in which that jurisdiction ought to be exercised. There are many cases in which a party may waive the benefit of a right which he would otherwise be clearly entitled to; and, in my opinion, the plaintiff has done so in the present case.

It appears from all the cases that have been cited, that the foundation of this rule originally was, that in a cause where the rights of the parties had been finally adjudicated on, where the parties litigant are satisfied, where the cause is asleep and nothing remains to be done, then a third party, not interested in any of the questions in the cause, not having any right to assert, shall not raise up a dormant cause, merely for the purpose of obtaining payment of his costs. But that is not the case here: the cause here is not dormant—the plaintiff is himself active in obtaining the benefit of the decree which has been pronounced; and it is stated, that orders to be made in this cause are at this moment undergoing discussion in another branch of the Court, upon other parts of the case. When that is the case, whenever the cause is alive, and the decree is in operation, in my opinion, the general rule does not apply.

I do not think my own decision in *Beytagh v. Concanen* ought to have much weight in the minds of other Judges, or that it ought to govern them in forming their judgments, although I cannot, of course, say that it has not some weight in my own. It is opposed by the decision of the late Master of the Rolls in *Averall v. Wade*; and certainly, if his decision be right, mine is not. There was certainly another circumstance in that case, that is, that it was a receiver who was ordered to pay the costs, upon which, also, I relied; but what I rested my judgment on was, that there was no necessity for a revivor as the cause was actually in operation.

If any doubt remained on my mind of the correctness of the judgment of the *Master of the Rolls*, I would take more time for consideration, and look more minutely into the authorities: but I am perfectly satisfied of the correctness of that judgment, and convinced by the able arguments with which the *Master of the Rolls* sustains it, and being also perfectly satisfied that justice has been done, I shall, without hesitation, affirm the order made by the *Master of the Rolls*.

Affirm the order of the *Master of the Rolls*, but without costs.

CROFTS v. POE.

(*Equity Exchequer*).

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Nov. 30.

MR. FURLONG, Q. C., for the plaintiff, moved that the Accountant General do, out of the cash in bank to the credit of this cause, draw in favour of the plaintiff for the sum of £180. 10s. 9d., being the amount of the taxed costs of the defendants, Lady Catherine Bernard, Thomas Bernard and Thomas P. Bernard, which costs were adjudged to be paid by the plaintiff to the defendants, the plaintiff to have them over against the fund: or that the said defendants be restrained proceeding against the plaintiff for the recovery of said costs, until after the funds in this cause be distributed.

The plaintiff was an *elegit* creditor of the defendant Poe: the defendants were prior *elegit* creditors in possession; a prior mortgagee; and others. The bill prayed an account, and for liberty to redeem the mortgage, and for a sale. By the final decree, it was ordered that the plaintiff do have his costs, in the first instance, out of the funds; and that the defendants, Lady C. Bernard, Thomas Bernard, and Thomas P. Bernard do have their costs in this cause against the plaintiff, and the plaintiff to have them over, together with his own costs, out of the money arising from the sale of the lands decreed to be sold. The defendants were proceeding by attachment against the plaintiff, to compel the payment of their costs.

The cash in bank to the credit of the cause was the produce of the rents of the estates, brought in by the receiver.

No sale had as yet been had under the decree.

Mr. Furlong.—The order made by the *Master of the Rolls in Loftie v. Lord Forbes* (a), upon the application of Mr. Hare the plaintiff in the second cause, is an authority in favour of the first part of this application. Although he ordered the plaintiff in the second cause (whose suit was stayed on the terms of his being at liberty to prove his demand and costs, and the costs of such defendants as he should be liable to pay under the decree in the first cause), to pay to a defendant in the second cause his costs, before he himself had received them out of the funds in the first cause; yet he also ordered the receiver in the first cause to pay to the plaintiff in the second cause the costs he so paid to the defendant. This part of the application is opposed by the prior mortgagee, who is the first reported creditor; but if the Court should be of opinion that the plaintiff is not entitled, as against the

The final decree ordered a defendant to have his costs against the plaintiff, and the plaintiff to have them over with his own costs, out of the money arising from the sale.

The plaintiff was a *prius* reported creditor. The Court refused to pay him the amount of those costs (for payment of which the defendant was proceeding against him by attachment), out of rents brought in by the receiver; but stayed the defendant's proceedings until further order.

Such a decree for costs is not to be enforced against the plaintiff unless the fund be insufficient, or he be guilty of *laches* in the prosecution of the suit.

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mortgagee, to have this money paid out to him, they will at least stay the defendants from proceeding against him until the funds are distributed. The proceeding is harsh, and arises out of the peculiar form of the decree in this Court. In Chancery, the costs of a necessary party, to whom nothing is reported due, are decreed to be paid out of the fund and not by the plaintiff; but in this Court, they are decreed to be paid by the plaintiff, the latter to have them over with his own costs out of the fund.

Mr. *Bennett*, Q. C., for the prior mortgagee, said that there was a large arrear of interest due to him; and objected to the money being paid out of Court to a *puisne* encumbrancer.

Mr. *Rolleston*, for Lady C. Bernard.—The plaintiff is to have these costs together with his own costs; and his costs are decreed to be the first charge on the funds.—[RICHARDS, B. The decree is express that these costs are to be paid out of the fund arising from the sale, and not from the rents and profits.]—The Court ought not to restrain the defendants proceeding for these costs against the plaintiff. Suppose the fund is not sufficient, are the defendants to lose their costs?

PENNEFATHER, B.

It is to guard against that contingency that the decree directs the defendants to have their costs against the plaintiff, the plaintiff to have them over with his own costs out of the funds. The costs are given against the plaintiff as an ultimate security to the party; but are not to be enforced against him, unless it appears that there are no funds in the cause applicable to their payment, or that the plaintiff is guilty of *laches* in prosecuting the suit.

RICHARDS, B., concurred.

The proceedings were stayed until further order, with liberty to the parties to apply as they might be advised.

READ, . . *Petitioner* ; DAVIS, *Respondent*.

URWICK, *Petitioner* ; SAME, *Respondent*.

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Equity Exch.
Dec. 4.

MR. PURCELL, on behalf of John Figgis, assignee under a commission of bankrupt issued against the respondent, moved that the receiver appointed in these matters do pass his account before the proper Officer, and that whatever balance should appear to be in his hands on foot of said account, the same might be paid over to J. Figgis as assignee of the bankrupt; and thereupon that the receiver be discharged.

In Easter Term 1834, the petitioner in the first matter obtained a judgment against the respondent, in the penal sum of £400; and in Trinity Term 1837, he obtained a second judgment against the respondent in the penal sum of £410. On the 6th of November 1837, he presented the petition in the first matter for a receiver under the 5 & 6 W. 4, c. 55; and a receiver having been appointed, the tenants were, by order of the 9th of February 1838, ordered to pay him their rents.

In Hilary Term 1837, the petitioner in the second matter obtained a judgment against the respondent, in the penal sum of £1000; and on the 19th of April 1838, he presented a petition under the same act; praying that the receiver in the first matter might be extended to the matter of his petition. The receiver was accordingly extended by order of the 25th of May 1838. The several judgments mentioned in the petitions in these matters were obtained upon bonds, with warrants of attorney to confess judgment collateral therewith. The respondent committed an act of bankruptcy on the 8th of May 1840, by filing a declaration of insolvency. On the 4th of June a commission of bankrupt was sued out against him; and on the 10th of the same month he was duly found and adjudged a bankrupt; and J. Figgis was chosen and appointed his sole assignee.

A creditor by judgment, entered pursuant to a warrant of attorney, obtained an order for a receiver under the 5 & 6 W. 4, c. 55, more than two calendar months before the issuing of a commission of bankrupt against the respondent, the consor; *Held* that his execution was protected by the 95th section, from the operation of the 126th section of the 6 W. 4, c. 14.

Mr. Purcell.—By the 126th section of the 6 W. 4, c. 14, it is enacted, that no creditor, having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution served and levied by seizure upon any part of the property of the bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors. *Crossfield v. Stanley* (a) decides that a judgment upon a warrant of attorney, is a

(a) 4 B. & Ad. 87.

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judgment by confession; and *Baker v. Pettigrue* (a), that a judgment creditor, upon whose petition a receiver has been appointed, is nevertheless merely a creditor having security for his debt, until the rents have been paid over to him. The latter case is an express authority for this application.

Mr. *Roger C. Walker*, for the petitioner in the first matter.

1. The question is to be considered as if the creditor had extended the lands by *elegit*, and gone into possession of them. In such a case, the creditor would cease to be a creditor having security for his debt; for the extent of the lands would operate as an extinction of the debt. *Crawley v. Lidgate* (b); *Anonymous* (c); *Hanger v. Fry* (d).—[PENNEFATHER, B. Though the execution by *elegit* may prevent, while it continues in force, the issuing of any other execution, yet that does not shew that it is a satisfaction of the debt. If the lands taken in execution are afterwards evicted, the plaintiff may have a second *elegit*, which shews that the debt is still subsisting.]—The 126th section of the 6 W. 4, c. 14, is the same as the 108th section of the English Bankrupt Act, 6 G. 4, c. 16, and a similar provision is contained in the 11 & 12 G. 3, c. 8, s. 4; yet no case is to be found, either in this country or in England, where it has been held that an *elegit* creditor in possession was bound to come in under the bankruptcy, and receive the unpaid portion of his debt rateably with the other creditors.

2. A judgment upon warrant of attorney is not a judgment by default, confession, or *nil dicit*, within the meaning of the 6 W. 4, c. 14. The construction put on the 8 & 9 W. 3, c. 11, s. 8, which enacts, that "if judgment shall be given for the plaintiff on a demurrer, or by confession or *nil dicit*, the plaintiff on the roll may suggest as many breaches," &c., is, that warrants of attorney are not included.* The words "default, confession, or *nil dicit*," manifestly imply a suit instituted.—[PENNEFATHER, B. Every judgment entered up in this country is in a suit instituted. The record of the judgment contains a declaration, and then an entry that the defendant cannot deny but that he owes the money. It is a judgment by confession.]—*Wymer v. Kemble* (e), and *In re Washbourne* (f), were also referred to.

Mr. *Rogers*, for the petitioner in the second matter.—It is not necessary to impugn the decision of the *Master of the Rolls* in *Baker v. Pettigrue*; for the facts in that case were very different from those in

(a) 2 Ir. Eq. Rep. 144.

(b) Cro. Jac. 339.

(c) Dyer, 299, b.

(d) Cro. Eliz. 310.

(e) 6 B. & C. 479.

(f) 8 B. & C. 444.

* See *Cox v. Rodbard*, 3 Taunt. 74; *Austerbury v. Morgan*, 2 Taunt. 195; and *Kinnorsley v. Mussen*, 2 Taunt. 264.

the present. There, the order appointing the receiver was made within two calendar months before the date of the commission of bankruptcy:—here, it was made more than two years before that period. This case, therefore, falls within the 95th section of the 6 *W.* 4, c. 14 (which is similar to the 6 *G.* 4, c. 16, s. 81); and *Godson v. Sanctuary* (a), in which all the decisions on the subject were reviewed, establishes that an execution executed more than two months before the issuing of the commission, is protected by the 95th section of the 6 *W.* 4, c. 14, even though it should be founded upon a judgment on warrant of attorney; and that the 126th section applies only to executions on judgments by default, confession, or *nil dicit*, where the seizure has taken place within two months before the issuing of the commission. The opinion of Sir J. Leach, V. C., in *Ex parte Botcherley* (b) is also decisive that the 126th section must be construed with reference to the 95th section.

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Mr. Fitzgibbon, in reply.—The opinion of Sir J. Leach, V. C., in *Ex parte Botcherley*, that the 126th section applies to those persons only who come in under the commission, cannot be supported. That section must receive the same construction here as the 95th section of the 6 *G.* 4, c. 16, does in England. It is in the same words, and cannot have a different meaning; but the 6 *G.* 4, c. 16, s. 81, cannot comprehend executions of this peculiar nature, which do not exist in England; neither can the corresponding act in Ireland. The receiver is the Officer of the Court, and receives the rents *in usum jus habentis*; but in executions by legal process, the money is received for the use of the plaintiff.

PENNEFATHER, B.

This is certainly a question of very considerable importance, and there has been a decision by the *Master of the Rolls* bearing upon the subject; but with respect to that decision, upon the facts presented to the consideration of his Honor, it is not necessary for this Court to give any opinion; for the matter, upon which it appears to me, at present, that the question in this case must be determined, did not occur in *Baker v. Pettigru*. The Court is not now about finally to dispose of this case; but it is my desire to express what my present view of the question is. This is an application on behalf of the assignees of a bankrupt—the bankruptcy occurring in this present year—that a receiver appointed over the estate of the bankrupt in the year 1837, at the suit of a judgment creditor, should be removed; and that the assignees should be let into the possession of the estate. Unquestionably, it has always been considered, until the enactment of the 6 *W.* 4, c. 14, that creditors in possession of the estate of their debtor, under an execution

(a) 4 B. & Ad. 255.

(b) 2 Gl. & J. 367.

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executed, were not affected by a subsequent act of bankruptcy. Now, if such were the understanding of the profession, and of the country in general, upon the construction of the 11 & 12 G. 3, c. 8 (which it certainly was), how very important is it, that a similar construction should be put on the last Bankrupt Act. If this application were complied with, no matter how long a judgment creditor might have been in possession;—no matter at what period his judgment had been obtained—no matter whether his debtor were a trader or not at the time of the confession of the judgment—he must lose the benefit of his execution if his debtor subsequently become a trader, and a bankrupt. The rights of judgment creditors, who took their securities from those who were not traders at the time, were protected by a clause in the 11 & 12 G. 3, c. 8; but the 6 W. 4, c. 14, omits altogether that saving:* so that if a creditor in possession by execution executed be not protected by the 95th section, he will be in this situation, that although he took his security from a person who, at the time, was not within the operation of the Bankrupt Act, and although he is in possession by virtue of an execution executed, he must lose his debt, by reason of a subsequent act of bankruptcy by his debtor, the possibility of which may not have entered into his contemplation at the time. If that be the law, its promulgation must strike every one with astonishment that the Legislature should have passed an act rendering judgments, which have so long been considered common securities in Ireland, insecure. The Court was for some time pressed with this view of the statute; the 95th section, and the decisions not having been adverted to: but, our attention having been called to them, I think that a fair and sound construction has been put upon the act by the Court of King's Bench, in the case of *Godson v. Sanctuary (a)*; which establishes, that where an execution creditor is in possession by seizure or levy for two calendar months before the date of the commission of bankruptcy, his execution is protected by the 95th section of the 6 W. 4, c. 14; and that the protection so given is to be considered as general, and extending to every kind of judgment, whether it be entered by default, confession or *nil dicit*, or by virtue of a warrant of attorney, or otherwise: that, to that extent, the 126th section must be considered as controlled (if its language do require control) by the 95th section: and that construing the two sections together, which is the proper mode of ascertaining the meaning of an act of Parliament,—cases which are protected by the 95th section do not come within the operation of the 126th. In

(a) 4 B. & Ad. 255.

* The 2 & 3 Vic. c. 86, saves from the operation of the 6 W. 4, c. 14, judgments obtained before the 1st of July 1836, and before the bankrupt became a trader. *Quære*, how far are judgment creditors protected by the 3 & 4 Vic. c. 105, s. 22, from the operation of a subsequent act of bankruptcy?

my opinion, this construction of the act will relieve the securities of the country from much of the difficulty which a contrary construction would cast on them : and will sufficiently protect the general creditors of the trader from that preference of one creditor which, it has been properly argued, ought to be considered as unjust. This is the view which it appears to me ought to be taken, if this were a case of an execution by *elegit*, in which the creditor had extended the lands and been in possession of them two calendar months before the date of the commission ; and the 5 & 6 W. 4, c. 55, puts a proceeding by petition for a receiver on the same footing as an *elegit*. I am therefore, at present of opinion, that this application ought to be refused.

FOSTER, B., concurred.

RICHARDS, B.

This being a new question upon the construction of a somewhat recent act of Parliament, I desire shortly to state the grounds of the opinion which I entertain. It is very difficult to maintain that a judgment upon a bond and warrant of attorney is not a judgment by default, confession or *nil dicit* ; and I cannot agree with the counsel for the petitioners, so far as they ground their opposition to this application, upon the construction sought to be given to the 126th section of the act, in that respect. It, however, appears to me, upon looking into the statute, that, collating the 95th with the 126th section, the latter must be held to refer to cases in which the execution has been laid on within two calendar months before the issuing of the commission. Nothing can be more general or emphatic than the language of the 95th section ; nevertheless it is argued for the assignees, that it is to be qualified by introducing into it a proviso similar to that contained in the latter part of the 126th section : (states the proviso annexed to the 126th section.) Why such a qualification should be introduced into the 95th section I do not understand ; for I concur in what has been said, that nothing can be more mischievous or unjust than to seek to give this act a construction which would tend to defeat and render of no effect securities by judgment, so long regarded in this country as of the highest character. The 95th section deals with all cases of execution executed, whether upon judgments by default, confession, *nil dicit* or otherwise ; then comes the 126th section, which is conversant about executions executed prior to the act of bankruptcy. The former section gives the creditor the benefit of his execution, so that it was executed two months before the issuing of the commission : the latter deprives him of the benefit of his proceedings, but saves the rights of creditors who had actually levied under the execution prior to the act of bankruptcy : and in that same section there is a qualification, that although generally, an execution executed

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prior to the act of bankruptcy shall not be affected by it, that provision shall not extend to executions upon judgments by default, confession or *nil dicit*. The 126th section therefore must be intended to refer to executions which do not come within the 95th section, and are not made the subject of the legislation contained in that section. It has however been further argued, that the appointment of a receiver under the 5 & 6 W. 4, c. 55, is not an execution within the meaning of the 6 W. 4, c. 14; but the 37th section of the former act is conclusive, that a creditor who obtains an order for the appointment of a receiver, is a creditor who has issued and executed an execution on his judgment. Therefore, as in this case, the creditor has executed his execution some years prior to the act of bankruptcy, I am of opinion that the case is not within the 126th section, and further, that the execution is protected by the 95th section of the statute.

On Saturday, the 5th of December, the judgment of the Court was delivered by

PENNEFATHER, B.

The Court deferred pronouncing its judgment definitely, in order that we might more fully consider the case decided by the *Master of the Rolls*: and having done so, we see no reason to deviate from the opinion entertained by us yesterday. It is satisfactory to find that the judgment of his Honor in *Baker v. Pettigrew*, does not conflict with our decision. In that case, the receiver had not been appointed two months before the issuing the commission of bankruptcy, even supposing that, according to the rule laid down in another case,* he is to be considered as having been appointed from the date of the conditional order. The question before his Honor was, therefore, argued wholly upon the construction of the 126th section of the 6 W. 4, c. 14; and his attention was not drawn to the 95th section, which is the one applicable to the case before this Court, and on which we found our judgment. The judgment of the *Master of the Rolls* may be perfectly correct upon the state of facts presented to him. Considering the case with reference to the 126th section only, he held that the debt was not satisfied by the appointment of the receiver, no more than it would have been by an award of an *elegit* and inquisition thereon; and therefore that he was a creditor having a security for the satisfaction of his debt, and within the operation of the 126th section of the act, but not within the protection of the 95th section. But his Honor held, as this Court does hold, that the appointment of a receiver is completely equivalent to an extent and seizure by virtue of an inquisition under an *elegit*; and it follows, that if the one be protected by the 95th section, the other, in similar circumstances must be equally protected. We fully concur in the reasons given by the Judges of the King's Bench for their judgment in *Godson v. Sanc-*

* *Barry v. Wilkinson*, ante, p. 121.

tuary. They did not adopt the construction contended for by the assignees; and which in this country would lead to incalculable mischief. Therefore, without presuming to say what would be the opinion of the *Master of the Rolls* upon a case like the present, it is sufficient to say that the case before him differed materially from the one upon which we are called to pronounce our judgment. The Court are of opinion that the application must be refused, but without costs.

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O'BRIEN v. FITZGERALD.

Dec. 7.

MR. J. O'BRIEN, for the plaintiff, moved that it be referred to the Remembrancer to allocate the funds in bank to the credit of this cause, being the produce of the sale of the lands decreed to be sold, to and amongst the several parties and creditors, according to their priorities: and also to inquire and report what sums the creditors, taking benefit under the decree, should contribute towards the payment of the plaintiff's costs, as between attorney and client, after payment of his costs between party and party: and that the costs of this motion, and of the reference, and of the report thereunder, should form part of the plaintiff's costs.

A creditor who has been stayed from proceeding in his own suit, and compelled to come in under the decree in another suit, will not be ordered to contribute to the costs of the plaintiff in that suit, as between attorney and client.

The bill was filed by a judgment creditor, for an account of the real and personal estate of the deceased debtor. It did not pray that creditors coming in under the decree might contribute to the expense of the suit. The ordinary decree was pronounced, under which several judgment and simple contract creditors came in and proved their demands. Some of the judgments so proved were prior to the plaintiff's judgment; others were *puisne*. For the application, *Daxon v. Steele* (a) was cited.

Mr. Bennett, Q. C., and Mr. Hobart, for Macnamara, a judgment creditor, opposed the application.—Macnamara had filed a bill for payment of his judgment; but upon the decree in this cause being pronounced, he was, by an order of the Court made upon the application of the inheritor, stayed from further proceeding in his own cause, upon the terms of being at liberty to prove his debt and costs of suit in this cause.

The rule only applies to persons coming in voluntarily under the decree: it is also confined to cases where the bill prays, and the decree directs all persons coming in under the decree to contribute to the plaintiff's costs. *Tallon v. Tallon* (b).

(a) Not reported.

(b) 6 Law Rec. N. S. 290.

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I do not consider it necessary that the bill should pray, or the decree direct, that those who come in and prove their demands under it should contribute to the plaintiff's costs. If the suit be of that nature that the general creditors may take advantage of the decree, it must be understood that if they do so, they come in under an implied condition that they are to contribute to the costs of the plaintiff; but the case of a creditor, who is stayed from proceeding in his own suit, stands upon a different ground. He is stayed for the general advantage of the estate, and upon the terms of getting his debt and costs: and if he be compelled to contribute to the plaintiff's costs, the conditions upon which he is stayed are not complied with, for he is not paid the full amount of his debt and costs.

Let the Chief or Second Remembrancer allocate the said sum of £6375 as is desired; and inquire and report what sum the creditors taking benefit under the decree, save the said Haire,* and Macnamara, should respectively contribute towards payment of the plaintiff's costs as between attorney and client, after payment of his costs between party and party; the costs of this motion and of the reference and report to be part of the plaintiff's costs.†

* Haire was another creditor, who was in the same situation as Macnamara, save that the proceedings in his cause were stayed by consent, on the same terms as in Macnamara's case.

† See *Bracken v. Drought*, 2 Jones, 114. The order in that case has been followed in subsequent cases, save as to compelling the defendants in the cause to contribute to the plaintiff's costs between attorney and client: with respect to which, the order in *Bracken v. Drought* was made *sub silentio*.

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In the matter of JOHN O'BRIEN, *Petitioner.*

(*Chancery.*)

Nov. 25.

THIS was a petition under the 5 G. 2, c. 9,* praying for a commission to issue for the purpose of inquiring and ascertaining the old mears and bounds of the commonage in the petition mentioned, consisting of bog, moss and lough; and if no such old mears and bounds existed, then to lay out and ascertain such reasonable mears and bounds between the petitioner and the neighbouring proprietors therein named, regard being had to the length of the profitable land adjoining the said commonage, according to the provisions of the act.

A commission for settling boundaries cannot be obtained by petition under the 5 G. 2, c. 9, when there are minors interested.

The petition, which was verified by affidavit, stated, that by a settlement bearing date the 22nd of May 1827, made on the marriage of petitioner with his present wife, the lands of Ballymahone were conveyed to trustees to the use of petitioner for life, with remainder to such one or more of the sons of the marriage; subject to such restrictions and limitations as petitioner should in manner therein mentioned limit and appoint the same; and in default of issue of the marriage, to the use of petitioner, his heirs and assigns.

That by the same settlement a sum of £20,000 was vested in trustees, upon trust to lay out and invest the same in the purchase of fee-simple estates, which it was thereby declared should be subject to the same uses and trusts as those therein mentioned with respect to the lands of Ballymahone.

That there was issue of the marriage several sons and daughters, and that petitioner had not executed the power of appointment given him by the settlement.

That a portion of the sum of £20,000 was afterwards invested in the purchase of the lands of Kilfenora and Knockacolline, in the county of Clare, which, by deed of the 5th February 1840, were conveyed to the surviving trustee of the petitioner's marriage settlement, upon the trusts therein contained respecting the lands of Ballymahone.

That the purchased lands were contiguous and adjoining to an extensive tract or commonage, consisting of bog, moss and lough; and that Sir Lucius O'Brien, Andrew Finucane, and Francis and William Fitzgerald were proprietors of the lands adjacent to said commonage.

That the proprietors of the adjoining lands, and their respective tenants in possession of said lands, had from time immemorial claimed

* This act will be found in the Appendix to Mr. Lowry's collection of the *Rules of the Equity Exchequer*, p. 46, and references in the notes to the previous decisions on it.

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and enjoyed the benefit of said commonage in common; and that the shares of said commonage, to which petitioner and each of the other proprietors were entitled, was in proportion to the extent of profitable lands adjoining the same.

Mr. *J. J. Murphy*, with whom was Mr. *Henn*, Q. C., now moved the matter of the petition, and contended that the statute extended to the case of a tenant for life. The object of the Legislature, as appeared by the preamble of the act, was to encourage the improvement of unprofitable bog; and the first section enabled any person "seized or possessed of any lands contiguous to any bog, moss or lough," to present a petition for the purpose of having the bounds thereof settled. That the petitioner was the only person having a vested estate in the lands, there being no limitation in the settlement to the sons, in default of appointment.

Mr. *Francis Fitzgerald*, on the part of a proprietor of adjoining lands, resisted the application, on the ground that the case was not within the act, which contemplated the establishment of permanent boundaries. There is no one before the Court to represent the minors, who are interested in this property. In *Waks v. Conyers (a)*, it was held that the Court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties.

The parties are not without remedy, for they may file a bill on behalf of the minors.

Besides, the affidavit of service is defective; it does not allege that the persons served are the only parties in possession; *Westropp v. M'Donnell (b)*.

Mr. *Henn*, Q. C., in reply.—The affidavit of the process-server states, that he served the several persons mentioned in it, "and that he knows the lands mentioned in the petition, and that he knows of no other persons having an interest therein, save the persons so served." If, however, the affidavit be defective, it should stand over for the purpose of serving the parties again; *Kelly v. Sheldon (c)*.

THE LORD CHANCELLOR.

I think the objection to the affidavit of service is a fatal one; and I have the less difficulty in yielding to it, because, independently of that objection, I do not think I could comply with the prayer of the petition. I do not, however, think the authority which has been cited by Mr.

(a) 1 Eden, 331.

(b) 1 Jones, 619.

(c) 1 Jones, 555.

Fitzgerald is applicable to the present case; that authority applies only to a case where the original jurisdiction of the Court is sought to be exercised, and does not govern such a case as this, where there is a jurisdiction created by statute. Here, however, is a summary jurisdiction, which the Court is called on to exercise; and the parties sought to be affected by it have a right to say that they are not to be troubled with an investigation which cannot be rendered conclusive. The party making the application is seized for his life only, with a power of appointment to his children, who are minors; and there is no one before the Court to represent those minors, or sustain their rights. A solicitor appears for them, but no counsel is instructed to appear, nor is there any way of ascertaining their rights in such a proceeding as the present. Before a commission could be issued, I would require a bill to be filed for the purpose of making the minors parties. I must, therefore, dismiss this petition.

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HERON v. STOKES.

Jan. 25.
and Feb. 2.

THE decree in this cause, which was pronounced on the 25th of January 1837, referred it to the Master to take an account of the personal estate and effects of William Heron the elder, the testator in the pleadings named, and of his debts and legacies, and funeral and testamentary expenses. Under this decree, the Master made his report on the 24th December 1840, by which he found that the testator William Heron made his will bearing date the 8th of June 1815, with three codicils annexed thereto, but not duly executed, so as to pass real estate, in the words following, that is to say, "My will is, what-
"ever I die possessed of, or in any way entitled to, together with what-
"ever property my wife may be in any way entitled to, shall produce to
"my wife an annuity of £100; to each of my daughters £100
"per annum, for themselves and their children; to my wife's mother, in
"addition to any property she may possess, so as to make up to her
"an annuity during her life of £100 per annum: said annuities, after
"the decease of my wife and her mother, to be equally divided among
"my three children, William, Mary, and Julia Louisa; but my will is,
"that my wife and her mother shall enjoy their annuities as above for
"their lives, and the life of the survivor of them, so that the survivor

A gift of personal annuities to A. and B. "for themselves and "their children," they not having any at the date of the will or death of the testator, gives them the absolute interest.

Under a bequest, "to be equally divided between my sister and her daughters," and my sister-in-law "and her children," the property is to be distributed per stirpes and not per capita.

By a marriage settle-

ment, freeholds and chattels real were settled upon the husband for life, with power to appoint by will among the children of the marriage, and in default of appointment the property was to be divided equally among the children; *Held*, that the shares of the children did not vest until the death of the husband.

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"shall possess an annuity of £200, to be, after the decease of both, "equally divided between my three children; all the rest and residue "of my property I give and bequeath to my son William; whatever "ready money or furniture I may die possessed of, I give and bequeath "to my wife, to be by her managed for the joint benefit of my three "children, herself, and her mother: and to my wife Mary and my "brother Augustus, I leave the execution of this my will."

First Codicil.—"It having pleased Almighty God to take away my "daughter Mary, it becomes necessary to alter the disposition of my "property after my decease, so far as relates to her; I, therefore, now "declare it to be my will, and hereby direct, that the £100 *per annum*, &c. "provided as within directed for my daughter Mary, shall be divided "equally between my son William and my daughter Julia Louisa, "and that my will as within expressed shall remain in all other respects "unaltered.—Dated 24th May 1817."

Second Codicil.—"And in case my son William shall die without "leaving issue male lawfully begotten, my will is, that after the decease "of my wife Mary and my daughter Julia Louisa, my remaining "property shall then be equally divided between my sister Anne Owen "and any daughters by George Taylor Owen (her present husband) she "may have then living, and my sister-in-law Charlotte Heron, widow "of my late brother Edward, and any children she may have by my late "brother Edward then living, share and share alike.—Dated 4th "July 1829."

Third Codicil.—"If, under any circumstances, the whole of the "property I leave shall fail to produce to my son William an annuity "equivalent to that bequeathed to my daughter Julia Louisa, viz., £150 "*per annum*, it is my will, that the actual amount of income, whatever "it may be, shall then be divided into ten equal parts, four of which "parts shall be paid to my wife Mary, and three parts to my daughter "Julia Louisa, and the remaining three parts to my son William. This "arrangement to continue until the income shall afford the full annuities "of £200 to my wife Mary, £150 *per annum* to my daughter Julia "Louisa, and at least £150 per year to my son William.—Dated this "15th July 1829."

That the testator died on the 8th of October 1831, leaving William Heron the younger, his only son and heir-at-law, Julia Louisa Heron his daughter, and Mary Heron his widow, him surviving.

That William Heron the younger died on the 28th of November 1832, intestate, unmarried and without issue; and that Julia Louisa married the defendant Stokes, and died on the 14th October 1834, leaving an only child, the defendant Louisa Stokes, an infant, her surviving; and that the testator's widow Mary died on the 13th October 1834; and the testator's mother-in-law died in the lifetime of his widow.

The Master further found, that Anne Owen, wife of the defendant George Taylor Owen, and sister of testator, died in July 1832, leaving two daughters by her husband, the plaintiffs Charlotte and Julia Owen, her surviving; and that it had been contended before him, on the part of the defendant John Stokes, and his daughter Louisa Stokes, that according to the true construction of the will and codicils, the said Julia Louisa, the mother of the minor defendant, became, upon the decease of the testator, entitled to an annuity of £150; and on the decease of her mother (Mary Heron) became entitled to an additional annuity of £100, making in all £250 in perpetuity, and that the defendant Stokes, on the death of his wife, became entitled, under the settlement executed on their marriage, bearing date the 11th November 1831, to said annual sum for his life; and that his daughter Louisa would, on his death, become absolutely entitled thereto: while on the other hand, it was contended on behalf of the plaintiffs (Charlotte Heron, testator's sister-in-law and her children), and the defendants Edward Heron and George T. Owen, that any annuity bequeathed to Julia Louisa was for her life only; and that the minor Louisa is not entitled to any annuities.

That the defendant G. T. Owen contended that the residuary property of the testator, subject to said annuities, became, on the death of William Heron the younger, divisible into two equal shares, one of which became divisible between his late wife and his two daughters, and that the other moiety became divisible between Charlotte Heron and her children, share and share alike; and that, on the other hand it was contended by Charlotte Heron and her children, that the testator's residuary property became, upon the death of William Heron, divisible in equal shares among Anne Owen and her two daughters, and Charlotte Heron and her children living at the death of William Heron. Those questions the Master submitted to the Court.

The Master further found, that by indenture bearing date the 26th of May 1798, and made on the intermarriage of testator William Heron with Mary Darley his late wife, certain freehold and chattel interests were vested in two trustees, upon trust, to permit William Heron to receive the rents during his life; and after his decease, upon trust for the issue male and female of the marriage, in such manner and form, shares and proportions as said William Heron should by his will, attested by three credible witnesses, appoint; and in default of any appointment, in trust for such issue, share and share alike. That there were nine children of the marriage, of whom six died under twenty-one in the life of the testator; and one (Mary Heron) attained her age, and died in the life of her father intestate, and without having been married.

That the plaintiffs, and the defendants Edward Heron and G. T. Owen contended that each of the children took a vested interest in the property which was the subject of that settlement upon their birth, and that the

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testator having died without having made any appointment, the shares of those who died in the testator's life formed part of his property, or that they were at least entitled to one-third of that property, in right of Mary, who had attained twenty-one in her father's life. That on the other hand, Stokes and his daughter, the defendant Louisa, claimed to be entitled to three-fourths of the whole of said unsettled property, in right of testator's daughter Julia Louisa; one moiety in her own right, and a moiety of the other moiety as next of kin of her brother William Heron.

This question also the Master submitted to the decision of the Court.

Mr. Pennefather, Q. C., Mr. Blackburne, Q. C., and Mr. Galeway, for plaintiffs.

First, as to the estate which the daughters took in the annuity of £100 given them by the will—the distinction between the present and *Wild's case* (a) is, that there the gift was to the parent and the children, while here the daughters are merely made the instruments by which the property is to be administered; and there is not a word of the children except in specifying the objects to which it is to be applied. To make "children" a word of inheritance is departing from its proper meaning, and the Court will not go beyond former decisions; and the decision in *Wild's case* does not apply to personal property; *Buffa v. Bradford* (b). A gift of an annuity to A., without saying more, gives merely a life estate, *Savory v. Dyer* (c).

As to the annuities which they were to take on the deaths of the testator's wife and mother-in-law, there are no words of inheritance, and they must follow the same rule as those given to the children immediately. The word "property," in the second codicil, includes every thing, according to the latest decisions. *Knocker v. Bunbury* (d); *Bowyer v. Blair* (e). And we contend that it is to be divided into eleven shares, of which plaintiffs are entitled to eight. The leading case upon that subject is, *Barnes v. Patch* (f), where under a bequest "to be divided equally between brother Lancelot's and sister Esther's children," the division was *per capita*. The same mode of division was adopted in *Davenport v. Hanbury* (g); *Freeman v. Parsloe* (h). As to the construction of the settlement, *Lawrence v. Maggs* (i) is precisely in point; and the same construction that was applied there was adopted in *Doe v. Martin* (k). If a child died in the parents' life, leaving children, the

(a) 6 Rep. 16, a.

(b) 2 Atk. 220.

(c) 1 Amb. 10.

(d) 6 Bing. N. C. 206.

(e) 2 Jebb & Symes, 39; S. C. 2 Ir. Law Rep. 149.

(f) 8 Ves. 604.

(g) 3 Ves. 257.

(h) 3 Ves. 421.

(i) 1 Eden, 453.

(k) 4 T. R. 39.

latter would take nothing, unless the shares were to vest, and no other time of vesting than birth is fixed.

Mr. *Warren*, Q. C., Mr. *Keatinge*, Q. C., and Mr. *Sterling*, for defendant Stokes and his daughter Louisa.

In this case there is no bequest of an annuity in cash. The principal part of the testator's property consisted of long terms of years, and he directs that whatever he shall die possessed of shall produce an annuity of £100. In *Savory v. Day*, there was a mere gift of a money annuity. *Buffar v. Bradford* does not decide that the rule in *Wild's case* does not apply to personalty; Lord Hardwicke decided that case on the ground that a child had been born between the date of the will and the death of the testator, so that it was unnecessary to resort to the rule in *Wild's case*.—We are entitled to the annuities during the continuance of the fund out of which they are to be paid, which in this case are long terms of years. *Hack v. Tuck (a)*.

The additional annuity given by the second codicil has the same qualities as the former; *Chatteris v. Young (b)*. As to the construction of the settlement, in all the cases cited on the other side there was a general power of appointment by any instrument: here the power could have been exercised only by will, and the limitation in default of appointment is only to those to whom the father could appoint, namely, those living at his death. The time of ascertaining who are taken under a limitation to "younger children," is when the property vests; *Tynham v. Webb (c)*. Here the property settled was the wife's, and if the husband died in her lifetime without having children, it was to go to her absolutely.

Mr. Sergeant *Greene*, for Owen and his children, and Mr. *Blake*, Q. C. for a defendant in the same interest.

In general, when a question has arisen as to a distribution *per stirpes* or *per capita* there has been no gift to the parents. Here the gift is, "to my sister Anne and her children, and to my sister-in-law and her children;" the word "and" between the two branches of the sentence clearly shewing, that the testator meant a division between the two classes mentioned in those branches: the cases are to be found collected in 2 *Powell on Devizes (d)* and 1 *Roper on Legacies (e)*. In *Blackler v. Webb*, cited on the other side, the question was as to the rights of the children: nothing was given to the parents. Upon the construction of the settlement, we rely on *Vanderzee v. Aclom (f)*, as precisely similar.

(a) 3 Lev. 270.

(c) 2 Ves. sen. 209.

(e) p. 139.

(b) 6 Mad. 31

(d) p. 236.

(f) 4 Ves. 771.

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Mr. *Collins*, Q.C., and Mr. *Mullins*, for the defendant Edward Heron, upon the question of the division *per stirpes* or *per capita*, cited *Errard v. Brooke* (a); and on the construction of the settlement, *Campbell v. Sandys* (b).

The LORD CHANCELLOR.

[After reading the will and codicils.]

The first question that arises in this case, is as to the interest which the testator's daughter takes in the annuity of £100 given her by the will. In my opinion she was entitled absolutely to that annuity: and it is not a mere bequest to her for her life, and consequently it has become, by the settlement executed on her marriage with the defendant Stokes, vested in him for his life, with remainder at his death to his daughter Louisa, the grand-daughter of the testator. For this construction, *Wild's case* appears to me direct authority, and the facts of the case and the terms of the will are almost identical. Here, as in that case, the bequest to the daughter and her children is immediate, and not by way of remainder, and the daughter had no child at the date of the will. It is said that the subject of the devise in *Wild's case* was real estate, and that in this will there is merely a bequest of personalty, but it does not appear to me that there is any validity in that distinction, and I do not find any authority on which it has been acted. The case of *Buffar v. Bradford* has been relied on as establishing that distinction, but that case appears to me not only not to establish any such distinction, but to acknowledge the authority of *Wild's case* as equally applicable to the case of a chattel as of real estate. The decision there rested on the circumstance, that at the time the interest vested in the daughter she had a child born, and it was held that the mother took jointly with the child; and Lord Hardwicke in his judgment, says, "it is the time of the possession in the present case which takes it out of the reasoning in *Wild's case*, the parent and the children are to take at the same time as joint tenants," so that here is a clear admission that the doctrine in *Wild's case* applies to personal as well as to real estate. And that doctrine does not rest merely upon the high authority of Sir Edward Coke, but we have the additional confirmation of Lord Hardwicke's authority.

This construction appears to me equally applicable to the shares of the annuities which had been given to the testator's wife and mother-in-law, and which were to arise on their deaths. The third codicil refers to the annuity of £150, given to the daughter, and to that given to her upon the deaths of the wife and mother-in-law, as parts of the same subject; and I think it was the testator's intention, that the daughter should have the same interest in both.

(a) 2 Cox. 213.

(b) 1 Sch. & Lef. 281.

With respect to the annuity which he had given in the will to his daughter Mary, and which, upon her death, he divided by the first codicil between his surviving children, it is abundantly clear, that a bequest substituted for another, which has failed to take effect is subject to the same conditions, and is to be construed in the same way, as that for which it is substituted : and it is only necessary to refer to the case of *Crowder v. Clowes* (a), as an authority for that position. The decision, therefore, on the first question involves this.

The second question is, whether under the second codicil the property is to be divided into two shares, one to go to his sister and her daughters, and the other to his sister-in-law, and the children of his deceased brother? or whether it is to be divided into eleven shares, one of which is to go to each of the children? In other words, whether it is to be divided *per stirpes* or *per capita*? Upon that point I am clearly of opinion, that the property is to be divided into two shares only, and on that footing the accounts are to be taken. Two cases have been relied on in argument, as authorities for the opposite construction, but in my opinion they are not applicable to the present case. The first is *Blackler v. Webb* (b). But there the bequest was to the testator's son Peter's children, and to his daughter Webb's children, and no interests were given to the parents. The second case relied on was *Butler v. Stratton* (c), and there in like manner, the gift was "to the children of Mary Patterson," and the parent took no interest. It was impossible in those cases to come to any other decision, than that the property was to be divided *per capita*. Now, the gift in this case is to the parents and the children jointly, and it is impossible to come to any other conclusion than that the testator intended the property to be divided equally, without any reference to the number of children.

The third question is, as to the construction of the settlement. (Here his Lordship stated the provisions of it, and the facts reported by the Master). Now, the first observation that occurs on reading those provisions is, that there is no power given to the father to appoint by deed, the only power given him is to make an appointment by will, to take effect at his death. It is not necessary, therefore, to consider the cases which have been decided on instruments containing a power to appoint by deed, as there is none such in the present case. Here, the time for ascertaining the objects of the power is when it could be executed, namely, the death of the donee; and if any of the children had died in his lifetime, leaving issue, that issue would not have been a proper object of the power, which could only have been exercised in favour of those who were alive when the will took effect. I think, therefore, that as the only power given was to be executed by will, those only can take in default of appointment, to whom an effectual appointment could have been made, that is, children alive at the death of the testator.

(a) *Ante.*(b) *Ante.*(c) *Ante.*

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(*Equity Exchequer.*)

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The clerk of the defendant effected an insurance upon his own life, one of the conditions of the policy being, that no person should effect an insurance upon the life of another, in whose life he was not interested; and shortly afterwards assigned the policy to the defendant, in consideration of the defendant paying the expenses of the insurance, and giving him an increased weekly salary, while in his employment. The defendant was not interested in the life of the clerk. In three weeks afterwards, the defendant dismissed the clerk from his employment without sufficient cause; and the clerk having died, his executor filed a bill against the defendant and the Directors of the insurance Company, to

set aside the assignment, as having been obtained by fraudulent means, and for payment. The Directors did not contest the liability of the Company; but paid the amount of the policy into Court, and were thereupon struck out of the bill. The case set up by the defendant, but not clearly proved, was, that the policy was effected wholly for his benefit, although in the name of his clerk.

Held, that the plaintiff was entitled to the relief prayed, on the terms of paying to the defendant the sums paid by him for effecting the policy and premiums, with interest.

Costs given to the plaintiff, because of the misconduct of the defendant in the progress of the suit.

JOHN SCOTT, who for many years had been a practising attorney, having been reduced in his circumstances, became, in the year 1833, the conducting clerk in the office of the defendant, J. C. ROOSE, who was a solicitor; and so continued from December 1833 until January 1836, at the salary of £52. 10s. *per annum*. Whilst he was so in the employment of the defendant, he, on the 29th of October 1835, effected an insurance upon his own life with the Yorkshire Fire and Life Insurance Company, for the sum of £500: and shortly afterwards, by endorsement on the back of the policy dated the 16th of December 1835, assigned it to the defendant. The endorsement purported to be an assignment of all J. Scott's right, title and interest in the policy, in consideration of a sum of money paid to him by the defendant; but no money was actually paid to the assignor at the time of making the assignment, and a blank was left in the endorsement for its amount. The bill charged that this blank had been surreptitiously and improperly, and without the authority of J. Scott, filled up with certain words and figures, for the purpose of giving validity and legality to the assignment, and of thereby obtaining from the Insurance Company, for the benefit of the defendant, the amount of the policy: but by whom the same were so introduced, the plaintiff could not state.

The case made by the plaintiff was, that at the time when the assignment was made, the defendant proposed to J. Scott, that if the latter would assign the policy to him, he would raise and augment his salary as conducting clerk in his office, and render his (J. Scott's) situation more comfortable; and that it was upon the faith of the expectation so held forth to him, of such an increase of his salary, that he agreed to assign the policy to the defendant.

The defendant, by his answer, gave this account of the transaction:— That the proposal to assign the policy came from J. Scott, and was made by him before the effecting of it; and that on J. Scott's settling with the Company for the insurance, he agreed with the defendant, that

Mr. Henn, Q. C., Mr. Brewster, Q. C., and Mr. M^cCullagh for the plaintiff.

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Mr. Smith, Q. C., Mr. Collins, Q. C., and Mr. Joshua Clarke, for the defendant, contended that it was not illegal for one person to effect an insurance upon his own life for the benefit of another, even though that other had not any interest in his life: that a consideration was not necessary to validate the assignment of a policy; *Fortescue v. Barnett* (a): and that no fraud or deception existed in this case, the defendant having a perfect right to dismiss J. Scott for misconduct, which right he *bond fide* exercised; and that he was not bound by the terms of the agreement to pay him the additional salary, after he had dismissed him from his service. Upon the question of the costs of the suit, they argued, that the bill being in the nature of a redemption bill, the plaintiff was not entitled to relief, except on the terms of paying costs, and cited *Bower v. Heaps* (b); *Gowland v. De Faria* (c); *Twissleton v. Griffith* (d).

BRADY, C. B.

In this case the plaintiff claims, as the executor of John Scott, a sum of £500, which has been brought into Court by certain defendants (and who were afterwards struck out of the bill) under an order of the Court; that sum being the produce of a policy of insurance effected by J. Scott upon his own life: and the claim is made upon this ground;—that the policy of insurance was the property of J. Scott; that an assignment of it, on which the defendant Roose relies, was improperly obtained from him by the defendant; and that, therefore, the plaintiff is entitled to rescind the transaction, and to be paid the money. I admit that it is competent, in this country, for a person to effect an insurance upon the life of another, in whose life he has no interest; for there is no act in force in Ireland similar to that in England, which prohibits wagering policies: and certainly it is also competent for one person to accept from another an assignment of a policy, which the latter has effected upon his own life, but in forming an opinion of the equitable claims arising out of such a transaction, the Court must look at all the circumstances of the case: and it is not too much to require a party, who seeks the benefit of a transaction of doubtful policy in the eye of the law—and which, in this particular case is virtually prohibited by the terms of the policy of insurance itself—to shew clearly and satisfactorily that he has in the fairest manner obtained the assignment of the policy from the party effecting it.

It appears, in this case, that the policy was effected in the name of

(a) 3 M. & K. 36.

(b) 3 V. & B. 117.

(c) 17 Ves. 20.

(d) 1 P. Wms. 310.

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J. Scott: therefore *prima facie*, it was his property: and it rests with the defendant to shew that the assignment obtained under the circumstances in this case, is one which he can uphold in a Court of Equity. The ground upon which he attempts to uphold it is, that, as he alleges, prior to the policy being effected, there was an agreement entered into between him and J. Scott, that the policy should be effected in the name of the latter, but for the benefit of the defendant. That agreement, however, was substantially a violation of that condition of the policy which declares, that no person shall effect an insurance upon the life of another unless he be interested in it; and then that the sum insured shall be commensurate with the amount of the interest. Here the defendant had not any interest in the life of J. Scott; and, as against the Company, he could not have sustained his case, if he had effected the insurance in his own name. Therefore, when the policy was effected, it certainly, as between the Company and J. Scott, became the property of the latter; no other person had a right to it; and no other person than his representative could, at law, recover its amount from the Company.

Then what were the circumstances under which this transaction took place? J. Scott was a clerk of the defendant's at a weekly salary of small amount; and it appears that part of the arrangement for effecting this policy by Scott was, that the defendant would, in consideration of its being procured, increase this weekly salary. The defendant might have made it a condition to his thus increasing J. Scott's salary, that the latter should enable him to effect an insurance upon his life, so that the defendant might have a security for such advances: but instead of that, his case is, that he negotiated for an insurance to be effected, in the first instance, altogether for his own benefit, though in the name of J. Scott; and as an inducement thereto, he promised J. Scott to advance his weekly salary, and to pay a small sum of money for clothes purchased by J. Scott. By his influence over J. Scott, he procured the latter to effect the policy in October 1835; and in December, he took a formal assignment of it, which purports to be, not an assignment in pursuance of any previous contract between the parties as put forward by the defendant, whereby the policy was, on being effected, at once to become the property of the defendant; but an assignment for valuable consideration, namely, for some sum of money paid by the defendant to the assignor, a blank being left for the precise sum. Having obtained this assignment, the defendant, who had thus procured the policy to be effected and assigned to him in part performance of an agreement whereby he stipulated to advance the salary of this unfortunate man, his own clerk, shortly afterwards dismissed him from his service, and withheld from him any further employment. It is said that J. Scott had been guilty of misconduct:—that has been examined

into; and the result is, in my opinion, that the defendant had not any just ground for so dismissing him. As to Mrs. T.'s money, of which so much has been said, and on which the defendant chiefly relied in this part of the case, it appears that J. Scott was in the habit of transacting money matters for the defendant, and accounting with him for his receipts and disbursements: it does not very clearly appear in what character this money of Mrs. T. was paid to J. Scott: and it subsequently was brought into account with the defendant, he undertaking to be accountable to Mrs. T. for it. So that it appears that that account was in fact settled, and amicably settled between the parties. That the policy was effected upon an arrangement between the parties that J. Scott's salary should be increased, is manifest from the documentary evidence produced by the defendant in the handwriting of Scott; but it does not, I think, distinctly appear from that evidence, that the policy was to be effected, or was assigned over entirely for the benefit of the defendant. It does not appear from it, that the parties did not contemplate that J. Scott might remain all the rest of his life in the employment of the defendant, and that the insurance was to be held by the defendant as an indemnity against the loss occasioned to him by the increased salary to be given to J. Scott, and that the residue, after indemnifying the defendant, was to be for the benefit of J. Scott. Nothing is said conclusive either way upon that subject in the evidence; and upon the whole of this transaction, I am of opinion that the defendant cannot in this Court be heard to say, that this was on his part a mere gambling speculation; and that he is entitled to the money, without regard to the interest of J. Scott, and contrary to the express terms of the policy, which prohibited him doing that directly which by this contrivance he has attempted to do indirectly. The money is now in the possession of the Court as a stakeholder, to be paid to the person justly entitled to it; and in my opinion the defendant cannot allege that he is that person; and that he, in contravention of the terms of the policy, and in opposition to the person in whose name the policy was, and could alone have been effected, is entitled to the money, absolutely and as his own property. I am, therefore, of opinion, that the demand of the plaintiff, who has the legal title to the money, is one which this Court ought to enforce on his behalf; but he must allow to the defendant the sums paid by the latter for premiums and for the expenses of effecting the insurance; and if the defendant asks for it, the small sums paid for extra salary under the agreement, with interest.

The next question is with respect to the costs of the suit. Before the bill was filed, the plaintiff by notice claimed the benefit of this policy, offering, as he also does by the prayer of his amended bill, to make those allowances to the defendant, which the Court is of opinion he is entitled to. No attention was given to that notice, and the bill

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was filed. What then has been the conduct of the defendant during the progress of the suit?—and here I advert entirely to the transaction with respect to the consideration money expressed in the deed of assignment. It certainly was important to shew whether a pecuniary or other consideration had been given, or appeared to have been given, for the assignment. It was charged by the bill that a blank for the amount of the consideration had, originally, been left in the assignment; and that it had afterwards been filled up by the defendant, without the authority of the assignor, with the sum of £50: but in his answer, the defendant gives no statement of that transaction further than that there was no sum whatever expressed as the consideration in the deed of assignment when it was executed, and that it still remained in blank, as it was originally perfected. A more uncandid and improper answer, under the circumstances of the case as they now appear in evidence, cannot be supposed! For it is proved that when the defendant produced this policy to Mr. Gray, in order to raise money on it, and afterwards to the Company for payment, a consideration of £50 appeared in the body of the assignment, written in ink; and upon inspection of the document, it is apparent that there is an erasure in that part of it where the consideration ought to be expressed. We have then the defendant putting forward in his answer an allegation, unfounded in point of candour, though, perhaps, it may have been literally true when the answer was sworn; and it appears that for his own purposes, and to effect his own objects, he has been tampering with this assignment as he pleased; inserting a consideration in it when he wanted to raise money, and erasing the consideration when he had to produce the deed to this Court. Under all the circumstances of the case, I am of opinion, that, looking at the original transaction, the defendant cannot be heard to allege in equity that he has a right to the money secured by the policy against the legal owner; but on the contrary, that he is only entitled to the sums he has advanced, with interest: and that the surplus, *ultra* those sums, belongs to the representative of the person who effected the policy, and with whom the Company dealt: and that the defendant's conduct has been such in the particulars I have mentioned, that he ought to pay the costs of the suit.

RICHARDS, B.

I fully concur in the decree the Court is about to pronounce. The late J. Scott was entitled, as any man in sufficiently good health is, to effect an insurance upon his own life, for his own benefit; but the defendant, not having any interest in his life, could not effect a valid insurance upon it with this Company. Under these circumstances, the defendant's case is, that not being entitled, by the express stipulations of this Company, to effect an insurance upon the life of J. Scott in his own name, he con-

cocted a plan to deceive the Company; and induced them to insure the life of J. Scott, nominally and ostensibly for the benefit of Scott, but in reality for the benefit and advantage of Roose the defendant; and that having done so, he is now entitled to the benefit of an agreement, which he alleges was previously entered into between him and J. Scott to that effect. I will not go the length of saying that if he had, in a clear and satisfactory manner, established the existence of such an agreement between him and J. Scott, this Court would interfere at the instance of J. Scott or those representing him, in a suit constructed as the present. Probably, in such a case the Court might think it more consistent with the principles by which it is governed, to leave the parties to their legal rights, whatever they might be. But I confess, that where an agreement of the nature set up by the defendant is relied on to turn out of Court the representative of a person circumstanced as J. Scott was, on the principle that we ought not to interfere between parties who participate in an arrangement which we cannot approve of, I would require the most clear and satisfactory evidence of the existence of such an agreement. Here, I cannot find that there is such evidence of the agreement set up by the defendant; and, therefore, I think it is safest to go by those documents which are common to the case both of the plaintiff and defendant; and which cannot be controverted. And, first, there is the policy of insurance, effected by J. Scott in his own name. Annexed to that policy is a stipulation which is directly in the way of the case now made by the defendant. It is, that no one shall effect an insurance upon the life of another unless he have an interest in such life; and then only to the amount of that interest. Yet the defendant desires that we should, without regard to the evidence as to the real nature of the contract arising out of the policy itself, and out of the stipulation that I have mentioned, jump at once to the conclusion that he (Roose), and not Scott, was from the beginning the beneficial owner of the policy; and that, not only contrary to the terms of the contract itself, but contrary to the case which he frequently alleged to different persons, and especially to the Secretary of the Company; namely, that he had paid £50 to J. Scott for the policy, and had got an assignment of it, in consideration of the payment of that sum; and upon the faith of which allegation he induced persons to lend him money on the policy. That was then his case.—But now he desires to retract all what he previously alleged, and to set up an agreement of the most undefined character, the nature of which it is impossible to understand. It is manifest, even upon the defendant's own shewing, that it was the intention that J. Scott should derive some benefit from the transaction. What was it to be? It is said that his salary was to be advanced five shillings a-week, so long as the defendant chose to continue him in his employment; but that the defendant might turn

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him off whenever he pleased. The Court could not recognise or act upon such a contract, even if it were proved; and in this case I think that the evidence arising out of the written documents disproves such an agreement. Therefore, in my opinion, we are not precluded from interfering in this case, by the operation of the principle to which I have alluded: we have now the proceeds of the policy in Court, the Company not raising any question on the subject, and the Court must deliver itself of this money some way or other. Are we then to order it to be paid to the defendant? I think not. I say nothing as to the right of a person in this country to speculate in gambling policies; but, I think it is against public policy that a master should be allowed to insure the life of a decayed servant, in whose life he has no interest, and as a mere speculation,—that servant being wholly dependent on him for his daily subsistence, and I may say altogether in his power; but I express no opinion as to the legality of such an insurance.

Then as to the costs. I should be sorry if we were coerced by any of the cases cited by the Counsel for the defendant to award costs to a person who, the Court thinks, has sought to deal most unfairly and unjustly: still more so, to a party who, the Court is satisfied, has given a false statement on his oath of an important fact in issue in the cause. The defendant's answer to the original bill has, in an important particular, been established, to my full satisfaction, to be utterly unfounded. In it he denied that the blank for the statement of the consideration in the assignment endorsed on the policy was filled up. He says, that such blank was there when the assignment was executed, and that it is there still. But upon being more closely interrogated upon the subject by the amended bill, he admits that the blank had been filled up in pencil, by some person, without his concurrence. *Cui bono?* Where is the man who did it? Has his name been mentioned? or has he been examined in the cause? No;—but on the contrary, we have the depositions of three witnesses,—one a most respectable gentleman,—that the blank was filled up in writing, which is corroborated by the erasure now appearing on the deed. Therefore, I fully concur in the decree pronounced by the *Chief Baron*, and that the plaintiff is entitled to the relief prayed, with costs; and I do not think that in making such a decree we interfere with any of the principles to be deduced from the cases relied on by the Counsel for the defendant.

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O'HARA v. CREAGH.

Jan. 15.

THE bill in this case was filed on the 2nd of December 1831; and stated that Lavinia Creagh, being seized in fee simple of the lands of Cahirbollog in the county of Clare, by indenture of the 20th of March 1804, conveyed the same to her son Simon Pierse Creagh and his heirs. Upon the marriage of Simon P. Creagh, he conveyed those lands, by indenture of the 18th of June 1807, to trustees and their heirs, in trust to secure a jointure for Dora Macnamara his intended wife, in case she should survive him, and in case the rents and profits of certain other premises, therein mentioned, should not be adequate for the purpose. Simon P. Creagh died on the 19th of October 1814, intestate, and left Dora Creagh his widow, and Pierse Creagh his eldest son and heir-at-law, him surviving: and Dora Creagh obtained letters of administration to his effects. In Hilary Term 1813, the plaintiff obtained judgment in case against Simon P. Creagh, for the sum of £123. 14s. 8d. besides costs. After the death of Simon P. Creagh, on the 8th of August 1816, Dora Creagh his widow passed her bond to the plaintiff, which the bill stated to be a collateral security for the debt due by Simon P. Creagh; and in Michaelmas Term 1826, the plaintiff obtained judgment on the bond, for the penal sum of £299. 14s. 2d., to secure the principal sum of £149. 12s. 1d., being the amount stated to be then due to the plaintiff on foot of the judgment against Simon P. Creagh. The bill expressly charged that the two judgments so obtained by the plaintiff were to secure one and the same debt; and that the sum of £50 was paid by Dora Creagh on account of said debt, in or about the year 1821. Dora Creagh afterwards intermarried with John Behan; and died leaving the defendant Pierse Creagh her eldest son and heir-at-law. Pierse Creagh afterwards obtained administration *de bonis non* to Simon P. Creagh: and the bill charged that he, as the heir-at-law of Simon P. Creagh and Dora Creagh, and also as the personal representative

A creditor by judgment of Hilary Term 1813, filed a bill in 1837, against the heir and personal representative of the conusor, for payment of the judgment.

The heir, who was also the personal representative of the conusor, by his answer relied upon the 3 & 4 W. 4. c. 27. s. 40. The judgment had not been revived, nor was any payment on account of the principal or interest thereof made, or any acknowledgment in writing of the right of the plaintiff thereto given, by the conusor or his real or personal representative, subsequent to the rendition thereof. The bill was dismissed with costs.

The defendant by his answer submitted, that by

reason of the 3 & 4 W. 4, c. 27, s. 40, the plaintiff was barred from maintaining his suit against him, as the heir-at-law of the conusor; and he relied upon that statute as if he had personally pleaded the same. *Held*, that it was competent for him, as personal representative of the conusor, to rely on the defence given him by that statute.

Upon a former occasion, the defendant moved to suppress all the depositions, on the ground that the interrogatories were not entitled in the cause. The Court made no rule on the motion, on the plaintiff producing the witnesses to be re-sworn; the plaintiff to be at liberty to amend the title of the interrogatories; and in default of his producing such witnesses, within a limited period, the depositions of such witnesses to be suppressed. The witnesses were re-sworn to the depositions to the former interrogatories. The defendant then moved to suppress a deposition, on the ground that the interrogatory was leading. *Held*, that he had pretermitted his time for making the objection.

Documents not under seal cannot be proved *vivâ voce* at the hearing of the cause, as exhibits.

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of Simon P. Creagh, was liable to pay the plaintiff his demands. The bill further set forth, by way of amendment, that at the time of the death of Dora Creagh, there was a large arrear due to her on foot of her jointure, which, by the settlement of the 18th of June 1807, was charged upon the lands hereinbefore mentioned; and that the defendant Pierse Creagh, upon the death of his father, entered into possession of those lands, and received and applied the entire rents to his own use; and that he refused to account for the arrears of the jointure: that there was a sum of upwards of £500 due to the plaintiff for principal, interest and costs on foot of said judgment; that P. Flynn was the personal representative of Dora Creagh, and F. Martin, the heir of the surviving trustee in the settlement of the 18th of June 1807. The bill then charged, that the defendant P. Creagh sometimes pretended that the judgment obtained by the plaintiff against Dora Creagh, was a satisfaction of the judgment obtained against Simon P. Creagh; whereas the plaintiff charged that it was a collateral and additional security only, for the debt secured by the judgment against S. P. Creagh: and, at other times, pretended that the judgment against S. P. Creagh was barred by length of time, and by the provisions of the Statute of Limitations; whereas the plaintiff charged, that the sum of £50 was paid to the plaintiff by Dora Creagh, on foot of the said last-mentioned judgment, and of the debt thereby secured; and that such payment prevented the operation of the statute as regarded said judgment. The prayer of the bill was, for an account of the sum due to the plaintiff on foot of the judgments against S. P. Creagh and Dora Creagh; an account of the real, freehold and personal estate of Simon P. Creagh, and also of the real, freehold and personal estate of Dora Creagh; and that the same respectively might be applied in a due course of administration; and in case the personal estate of S. P. Creagh and Dora Creagh should be insufficient for payment of the plaintiff's demand, that then the real estates might be sold for payment of the demands of the plaintiff and the other creditors of S. P. Creagh.

The defendant Pierse Creagh, by his answer to the original bill, relied on the following defences:—First. That supposing, but not admitting, that Dora Creagh passed her bond for the amount of the sum claimed by the plaintiff, as due to him by Dora Creagh, as administratrix of S. P. Creagh, the same was given in full discharge and satisfaction of the said debt, and not as a collateral security. Secondly. He admitted that he was the eldest son and heir-at-law both of Simon P. Creagh and Dora Creagh; and also that he was the personal representative of Simon P. Creagh, having obtained letters of administration to him since the death of Dora Creagh; but he denied that he was personal representative of Dora Creagh; and submitted that he was not liable to pay the plaintiff, as in the bill alleged; for that by the 3 & 4 W. 4, c. 27, s. 40 (which he set out at length,) the plaintiff was barred from maintaining his suit against

the defendant, *as the heir-at-law of Simon P. Creagh*, in respect of the judgment debt, so as aforesaid alleged to have been recovered against the said Simon P. Creagh in the year 1813, a period of more than twenty years having elapsed since the recovery of said alleged judgment and the filing of the plaintiff's bill; and no part of the principal money, or any interest thereon having been paid, or any acknowledgment of the right of the plaintiff thereto having been given in writing by the defendant, or any agent authorised by him, to the plaintiff: and the defendant relied on the said statute, as if he had personally pleaded the same. Thirdly. The defendant relied upon the marriage settlement of 1807, as shewing that Simon P. Creagh was but tenant for life, and the defendant tenant in tail of the lands of Cahirbollog: and said that he was not entitled to any real estate as heir-at-law of Dora Creagh.

By his answer to the amendments, he denied that any arrear of jointure was due to Dora Creagh at the time of her death, and said that he was not liable to account for such arrears.

Upon the evidence, it appeared that the date of the letters of administration of the effects of S. P. Creagh, granted to Dora Creagh, was the 24th of June 1820; previous to which period there was not any personal representative of S. P. Creagh.

The judgment against Simon P. Creagh, and also the bond and warrant of attorney executed by Dora Creagh, and the judgment entered thereon, having been proved; it was proposed, on behalf of the plaintiff, to read the depositions to the fifth and sixth interrogatories.

Mr. Collins, Q. C., for the defendant, pursuant to leave given for that purpose, moved to suppress the depositions, the interrogatories being leading.

Mr. Henn, Q. C., for the plaintiff, objected that the defendant had waived his right to suppress the depositions on this ground. On the 16th of April 1840, the rule to pass publication was made absolute; and on the 24th of April, the defendant was served with the subpoena to hear judgment. On the 29th of May, the cause being then in the list for hearing, the defendant took out a copy of the depositions; and on the 2nd of June served the plaintiff with notice of a motion to suppress all the depositions, on the ground that the interrogatories were not entitled in the cause, the name of one of the defendants having been omitted through mistake. On the 20th of June, that motion came on to be heard, when the Court made the following order:—"No rule, on the plaintiff producing the witnesses to be re-sworn before the Examiner: and let him be at liberty to amend the title of the interrogatories: and in default of the plaintiff producing such witnesses on or before the 12th of November next, let the depositions of such witnesses be suppressed. The plaintiff to pay the said defendant the

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"costs of this motion." The plaintiff accordingly produced his witnesses, and caused them to be re-sworn to the depositions to the former interrogatories; of which the fifth and sixth, now objected to, formed part. Notice of the present motion was served on the 11th of November. The motion was made on the 4th of December 1840, when the Court* directed it to stand until the hearing of the cause.

The motion ought to be made immediately after publication has passed; this is expressly the practice in Chancery, and impliedly in this Court; as appears by the Rule of the 22nd of February 1731, in Chancery, and the 86th Rule of this Court. Upon this ground *Ball v. Philips* (a) and *Stawell v. Stawell* (b) were decided. The observation of the *Master of the Rolls* in the latter case, that a party had no right to dole out his objections by degrees, and having been beaten on one technical objection, to raise another, is peculiarly applicable to the present case.

Mr. *Smith*, Q. C., and Mr. *Collins*, Q. C., *contra*.—The former order established that, at that time, there were no interrogatories in this

(a) 6 Law Rec. N. S. 388.

(b) 3 Law Rec. N. S. 17.

* *Pennefather*, B., and *Richards*, B.—On that occasion, it was also insisted by the Counsel for the plaintiff, that the defendant had waived the objection; and he cited the same authorities, and relied on the same case as above. Mr. *Kennedy* for the defendant argued, that until the witnesses were sworn to the amended interrogatories, there were no depositions in this cause: and, therefore, that there was no waiver.

RICHARDS, B.—If the defendant had made the present objection at the same time with the former, it would have been inconsistent with it; for it assumes that there are interrogatories in the cause.

PENNEFATHER, B.—The order made upon the former motion assumes that the defendant was entitled to succeed upon it; but *ex gratia*, the Court permitted the depositions to stand, the plaintiff amending the title of the interrogatories, and re-swearing the witnesses. The defendant had a well-founded objection to all the depositions, and was not bound to bring forward an objection to a particular interrogatory, which was inconsistent with his general objection. Here the two objections are quite inconsistent, and could not be made together. One is upon the ground that there are not any interrogatories in the cause; the other, that there are interrogatories, but that some of them are leading. I am of opinion that the defendant has not waived this objection. *Non constat*, that the plaintiff would have re-sworn the witnesses to these interrogatories. But as by the rule of this Court we might allow notice of a motion to suppress the depositions to be served for the hearing, if such a course appeared to be conducive to justice; and as upon the debate of this motion it will be necessary to have the facts of the case before us, we think it better to save this notice until the hearing of the cause.

It will be observed that Baron *Richards*, upon further consideration of the matter, altered the opinion he expressed when the motion was first debated. Baron *Pennefather* was not present at the hearing of the cause; and, therefore, had not an opportunity of reconsidering the subject: but it has nevertheless been thought proper to give to the profession a note of the first motion, that his view of the matter might be before them.

the defendant, *as the heir-at-law of Simon P. Creagh*, in respect of the judgment debt, so as aforesaid alleged to have been recovered against the said Simon P. Creagh in the year 1813, a period of more than twenty years having elapsed since the recovery of said alleged judgment and the filing of the plaintiff's bill; and no part of the principal money, or any interest thereon having been paid, or any acknowledgment of the right of the plaintiff thereto having been given in writing by the defendant, or any agent authorised by him, to the plaintiff: and the defendant relied on the said statute, as if he had personally pleaded the same. Thirdly. The defendant relied upon the marriage settlement of 1807, as shewing that Simon P. Creagh was but tenant for life, and the defendant tenant in tail of the lands of Cahirbollog: and said that he was not entitled to any real estate as heir-at-law of Dora Creagh.

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In *Ash v. Lowe*, which was heard before this Court in Easter Term 1833, I proposed on behalf of the plaintiff to prove as exhibits, and read, certain letters of the defendant Lowe; Mr. Brooke, for Lowe, objected; the matter was debated, and the practice of the Court of Chancery was relied upon. But this Court ruled that the handwriting of letters could not be proved at the hearing, on the side-bar rule.

Mr. Henn, Q. C., then applied for liberty to exhibit an interrogatory, to prove the handwriting of the drawer; but the Court considered the case to be such that the plaintiff was not entitled to any favour, and refused the application.

Evidence was tendered that the bond of 1816 was passed as a collateral security with the judgment of 1813. It consisted of admissions made by Dora Creagh at the time of the execution of the bond, and of letters subsequently written by her. It was objected, on behalf of Pierse Creagh, that neither the admissions or letters of Dora Creagh had been put in issue by the bill; and even if they had, that they were not evidence against him. The Court, without ruling the objection, intimated that, under the circumstances of the case, they would not give any weight to the evidence.

Mr. Henn, Q. C., Mr. J. O'Brien, and Mr. O'Hara, for the plaintiff.

The defendant has not relied upon the 8 G. 1, c. 4, or upon length of time, as a bar to the relief sought; but merely upon the 3 & 4 W. 4, c. 27, s. 40: and he has relied upon that statute in bar of the relief sought against him as the heir of Simon P. Creagh only, and not in bar of the relief sought against him as his personal representative. Therefore, the plaintiff is entitled to an account of, and payment of his judgment of 1813 out of, the personal estate of Simon P. Creagh. But even though the Court should be of opinion, that the defendant has sufficiently relied, in his answer, upon the 3 & 4 W. 4, c. 27, s. 40, as a bar to the relief prayed against the personal assets of Simon P. Creagh; yet that defence fails him, in point of law; for that statute only applies to proceedings against real estate. It is not conversant with suits relating to personalty merely. All the previous sections of the statute are, confessedly, applicable to suits relating to real estates only; and the object of the Legislature in the 40th section is manifestly to protect real estates from stale demands; for it applies to money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of land. The only Statute of Limitations which operates as a bar to a demand on foot of a judgment against personal estate, is the 8 G. 1, c. 4; which the defendant has not relied on in his answer. Even if he had, it would not have availed him, for this case is not within the bar of that statute. It has been decided upon the construction of that act, that where there are two securities for the same debt, a payment on foot of one, within

twenty years, will keep alive the creditor's remedy on foot of the other ; *Makon v. Davoren* (a); *Warrens v. O'Shee* (b); *Kelly v. Kelly* (c). The same efficacy must be given to an action or suit on foot of the one, within twenty years: for the 8 G. 4, c. 4, s. 2, makes no distinction between a payment and an action or suit for the recovery of the debt; and if either be proved to have occurred within twenty years, the remedy is not barred. Upon the question whether the bond of 1816 was a satisfaction of the judgment of 1813, *Hardwicke v. Mynd* (d); *Saunders v. Leslie* (e), and *Dartnell v. Taylor* (f), were referred to.

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Mr. Smith, Q. C., Mr. Collins, Q. C., and Mr. Kennedy, for Pierse Creagh, were not called on by the Court to argue the case.

BRADY, C. B.

The bill in this case is filed by the plaintiff, claiming the amount of two judgments,—one a judgment against Simon Pierse Creagh, and the other against Dora Creagh; and he seeks to have an account taken of the real and personal estates of those persons respectively, and for payment of his demand thereout. With respect to the judgment against Simon Pierse Creagh, the facts are these:—that judgment was obtained by the plaintiff in Hilary Term 1813; and he has not proved any dealing specifically on foot thereof, from that period to the filing of the bill. It has never been revived; no payment specifically on account of it has been made; no acknowledgment in writing of its existence has been given; nothing has been done on it, from the date of its entry to the filing of the bill. Therefore, so far as relates to that judgment, the Court is of opinion that the plaintiff has failed in sustaining his demand, either as against the real or the personal assets of the debtor.

As to the real estate, the Counsel for the plaintiff are disposed to concede that they cannot sustain his claim; for the defendant has, in his answer, relied upon the 3 & 4 W. 4, c. 27, and no evidence has been given to satisfy the Court that any thing has been done, in regard to that judgment, which would relieve the plaintiff from the bar of the statute. No part of the principal or interest has been paid, nor any acknowledgment of the right given in writing signed by the party chargeable therewith or his agent, to the person entitled thereto or his agent, within twenty years before the filing of the bill. Therefore, as to the real estate of Simon P. Creagh, the plaintiff's demand has been barred by force of the statute. But it is contended that although this may be the case, so far as regards the real estate of Simon P. Creagh, never-

(a) 2 H. & Bro. 523.

(b) 5 Law Rec. N. S. 77; S. C. 1 J. & S. 504.

(c) 6 Law Rec. N. S. 222.

(d) 1 Aust. 111.

(e) 2 Ball & B. 509.

(f) Ll. & G. temp. Plunk. 247.

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theless the judgment is operative as against his personal estate ; for that the defendant has not relied upon the 3 & 4 W. 4, c. 27, as a bar to the plaintiff's demand against the personal estate. But the Court is of opinion, that taking a fair view of the answer, in which the defendant has put forward the statute, and claimed the benefit of it as formally as if he had pleaded it in bar of the plaintiff's demand, the defendant is entitled to rely upon it as a defence, with respect both to the real and personal estate of the conusor. It is then said, that so far as regards personal estate, the statute has not any operation. I am not prepared to adopt that argument. I think it would be strange if it were open to a party to obtain the benefit of a judgment, after the lapse, it may be, of forty years, against the personal estate of the conusor, when by the act of Parliament his demand was barred as against the real estate. I am not prepared to say that this act, which provides that no action or suit, or other proceeding shall be brought (it does not say, against real estate), to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same,—does not extend to protect personal estate from demands which affect real estate, and which, as to such estate, have been barred by the operation of the act. If the argument of the Counsel for the plaintiff, on this point, be correct, it follows that the only Statute of Limitations applicable to a demand on foot of a judgment against personal estate, is the 8 G. 1, c. 4, and that unless the defendant brings his case within that statute, the plaintiff is entitled to the relief prayed. In my opinion, there would be great difficulty in holding that position to be law. Suppose the case of a *scire facias* on a judgment, to which the defendant pleads payment, and also a special plea of the 3 & 4 W. 4, c. 27, s. 40 ; and that to the latter plea the plaintiff replies an acknowledgment in writing, within twenty years ; if the construction contended for by the Counsel for the plaintiff be correct, it would follow, that if the acknowledgment in writing be proved on the trial, and, therefore, that the plaintiff in the action is entitled to the benefit of his judgment as against the real property of his debtor, he must nevertheless submit to a verdict against him, on the plea of payment ; and, therefore, I conceive, to a judgment against him, on the whole record : it being found by the jury that the demand was paid, although no evidence of payment in fact was given, and although an acknowledgment in writing of the plaintiff's right to the sum secured by the judgment was proved, and was sufficient to rebut the bar of the 3 & 4 W. 4, c. 27, s. 40 ; and it would, in the same manner, follow that the party might be entitled to a verdict in his favour, in a proceeding on the judgment against the personal representative, while the verdict must be against him,

if the proceeding were against the heir. I do not see how that position can be sustained;—how a demand can be worked out against the personal property of the debtor, where the proceeding is barred as against his real estate. Therefore, I read the 3 & 4 *W.* 4, c. 27, s. 40, as barring a demand which might have been recovered against the real estate, whether it be sought to be put in force against the real or personal estate. In my opinion, therefore, the judgment of 1813 is not in force against either the real or personal estate of Simon P. Creagh; and the bill, so far as it relates to that demand, must be dismissed with costs.

I have also taken into consideration the argument of Mr. *O'Brien*, that if the 8 *G.* 1 be in force, the entering the judgment on the bond and warrant of Dora Creagh, in 1826, was a proceeding on the judgment of 1813, so as to keep it in force. For the reasons I have given, I do not feel called on to say more, than that the argument carries the doctrine of the cases cited farther than any authority. In the cases cited, there were two securities passed at the same time, for the same debt; one by the principal and the other by the surety: and in such cases, the Court has held, that a proceeding on the one security was a proceeding on the other. But, in this case, it is sought to carry the doctrine there laid down much further; and to establish that a proceeding upon a new security for the same debt, given several years after the rendition of the original judgment by a distinct party, and for the debt created by that security, is a proceeding on the original judgment within the meaning of the 8 *G.* 1, c. 4. If that question arose specifically in this case, I would require very cogent arguments to be adduced in support of it, ere I could bring my mind to that conclusion; but I am relieved from the consideration of it at present. My opinion is, that so far as relates to the demand of the plaintiff on the real and personal estate of Simon P. Creagh, the bill must be dismissed with costs; but as to his demand against the real and personal estate of Dora Creagh, on the judgment against her, the plaintiff is entitled to the ordinary decree.

RICHARDS, B.

I am of opinion that the bill, so far as it seeks to affect the assets of Simon P. Creagh, must be dismissed. It is filed, so far as it relates to this object, to raise out of his real and personal assets, a judgment of Hilary Term 1813. No proof of any payment, either on account of the principal or interest of that judgment, has been given; nor is there any proof of any proceedings having been taken on foot of it, from the date of its entry to the filing of the bill. Upon these grounds alone, I cannot understand upon what principle it can be contended that this bill, so far as relates to that judgment, should not be dismissed. It is true the plaintiff alleges, that in 1816, after the death of the consor of that judgment, his widow, Dora Creagh, passed her bond to the plain-

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tiff, as a collateral security with the judgment of 1813: but all this rests on mere allegation; and it is not even alleged that she was, at that time, the personal representative of the conusor. It appears, besides, that the bond was not given for the same amount as the judgment of 1813, which was a judgment in case; and there is no evidence which this Court could receive, to shew that it was given for the demand secured by the judgment of 1813. The fact, therefore, not being proved, it is unnecessary to say what would be the effect of a bond so given, as a further or additional security for an antecedent judgment debt, by a person afterwards becoming the personal representative of the conusor; and of a judgment upon such second bond. I will only say, that I am not prepared, without argument, to accede to this proposition—that if, at the expiration of nineteen years from the rendition of a judgment, a bond be given by a third party, as a security for the debt secured by such judgment, and judgment be afterwards entered on that bond, the entering of that judgment is to be considered as a proceeding under the 8 G. 1, c. 4, so as to keep the former judgment alive. *Makon v. Davoren* has been cited to support that proposition; but it does not go so far. Again, it has been said that there was a payment made within twenty years on foot of the bond of 1816; and it is argued, that as the bond was given, as it is said, to further secure the sum due on foot of the judgment of 1813 (a matter, however, which, as I have already observed, has not been proved), the payment on foot of the bond was a payment on account of the original judgment; and that, therefore, the case is out of the operation of the 3 & 4 W. 4, c. 27. But there is no evidence of the payment so relied upon; on the contrary, I must say, that the attempt to establish the allegations of the plaintiff's bill, in that respect, has wholly failed. It is, therefore, unnecessary to give any opinion on that question, the proofs not supporting the case made by the plaintiff. But again, it is said that the defendant has, in his answer, relied on the 3 & 4 W. 4, c. 29, s. 40, only, and not upon length of time generally, or upon the 8 G. 1, c. 4; and it has been argued, that the 3 & 4 W. 4, c. 27, s. 40, does not extend to demands against personal estate.—[The Baron here read the 40th section.]—Now, in my opinion, we ought not to cut down the operation of the general words of that enactment, for the purpose of establishing a difference in respect to the effect of a judgment or other security, according as it is sought to be enforced against real or personal estate. The language of the statute is general:—that no action or suit, or other proceeding shall be brought to recover any sum of money secured by judgment, &c.—and the Legislature, when passing that act, must have been aware of the state of the law in this country, and of the bar created by the 8 G. 1, c. 4. Therefore, I cannot suppose that it was the intention of the Legislature to allow a proceeding to be taken on a judgment to affect personal estate; and, under the same circumstances, not to permit a proceeding

to be taken to affect real estate. When a creditor proceeds to revive his judgment in the lifetime of a conusor, it is impossible to say whether it is against the real or personal estate he intends to make it available. I fully concur in the observations of the *Chief Baron* on this part of the case, and cannot accede to the construction sought to be given to the 40th section of the act, by the Counsel for the plaintiff. Therefore, upon all these grounds, I am of opinion, that this bill must be dismissed with costs, so far as it relates to the real or personal assets of Simon P. Creagh; but there must be the usual decree, to take an account of the real and personal estate of Dora Creagh.

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HENEGAN, *Petitioner*; LITTLE, *Respondent*.

CONNELL, *Petitioner*; Same, *Respondent*.

THE receiver in this matter was appointed upon a petition under the 5 & 6 W. 4, c. 55, on a judgment, over a portion of the lands of the respondent. The respondent had returned a rental, in which he stated that the head-rent payable out of the lands over which the receiver had been appointed, was £47. 11s. It now appeared that the lands in the possession of the respondent, as well as those over which the receiver had been appointed, were held under one lease, at the yearly rent of £64. 15s. 5d.; and the head-landlord had resorted to the latter for payment of his rent. It was alleged, that the rental of the premises over which the receiver had been appointed would be insufficient for the payment of the petitioner's debt within a reasonable time, if the whole head-rent were to be paid out of it.

Mr. *Armstrong* now moved, on behalf of the receiver, that the respondent be ordered to pay, to the head-landlord, his proportion of the head-rent, payable out of the house division of the lands, in the possession of the respondent.

RICHARDS, B.

He must either pay his proportion of the head-rent, or submit to have the receiver extended over the lands in his possession.

Let the respondent pay to the head-landlord the sum of £17. 5s. 5d. a-year, commencing from the 1st of November last, one half-year under another, without prejudice to the petitioners being at liberty to apply to extend the receiver over that part of the lands in the possession of the respondent, in case default shall be made in payment of such rent.

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Where a receiver on a judgment is appointed over a portion of lands held under one lease, the residue remaining in the possession of the respondent, the latter must either pay his proportion of the head-rent, or submit to a receiver over the whole of the lands, if otherwise, the lands over which the receiver has been appointed would be insufficient to pay the petitioner within a reasonable time.

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The answer was sworn in Dec. 1838; publication passed in May 1840. In Hilary Term 1841, the plaintiff applied to take the answer off the file, in order to prosecute the defendant for perjury in it: *Held*, that the application was not too late.

REEVES v. CLARKE.

MR. ROLLESTON, for the plaintiff, moved that the answer of one of the defendants be taken off the file, and handed to the Clerk of the Crown for the county of —, to be produced upon a prosecution for perjury committed by the defendant in the answer.

The answer was sworn and filed in December 1838: publication of the depositions of the witnesses in this cause passed in May 1840.

For the plaintiff, it was stated that the application was delayed, partly by reason of the poverty of the plaintiff, and partly from a desire not to prejudice the case, by making the application before the examination of the witnesses had closed. No prejudice could now be cast on the defendant's case by the Court granting the application.

Mr. P. Blake, *contra*.

The Court* approved of the grounds upon which the plaintiff acted; saying, that as publication had passed, and as the criminal prosecution could not have any effect on the proceedings in the cause, the application ought to be granted, unless there were extraordinary *laches* on the part of the plaintiff.

* Foster, B., and Richards, B.

ATKINSON, Administrator of ATKINSON, v. CALDWELL.

Jan. 21.

Practice. Entering an appearance for a defendant served out of the jurisdiction, pursuant to the 4 & 5 W. 4, c. 82.

MR. CHAMBERS, for the plaintiff, moved that an appearance should be entered in this cause for the defendant Peter M. Watson, pursuant to the provisions of 4 & 5 W. 4, c. 82, s. 1.

By order of the 15th of June 1839, reciting an application on behalf of the plaintiff, that service of the subpoena to appear and answer the bill in this cause, directed to the defendant P. M. Watson, by serving same upon him at Demopolis, in the state of Alabama, in the United States of America, might be deemed good service, it was ordered that service of the subpoena to appear and answer the bill in this cause, directed to the defendant P. M. Watson, be deemed good service thereof, pursuant to the provisions of the 2 W. 4, c. 33, and of the 4 & 5 W. 4, c. 82, pro-

vided that service be made personally on said defendant four months before the return thereof, and provided that a copy of the prayer of the bill in this cause, as directed by said statutes, be served in like manner with a copy of said subpoena, together with a copy of this order; and if such service be made by a person going out from this country, and who may return to it, the affidavit of service to state whether he had previously known the said defendant P. M. Watson; and if not, that said affidavit do state what means he took to ascertain the identity of said defendant, resorting for that purpose, if it be possible, to some civil or military Officer in her Majesty's service; and if no such person be resident in Demopolis aforesaid, then to some Officer of the State of Alabama: and if the service be not made by a person going out from this country and* not returning to it, that the person actually serving such subpoena do make an affidavit containing the particulars aforesaid, or so many of them as can be; and that such affidavit be sworn before the Chief Magistrate of the district where the said P. M. Watson resides.

The affidavit of service stated, that on the 6th of January 1840, the process-server personally served the defendant with true copies of the subpoena, which was returnable the 18th of May 1840, and of the prayer of the bill and order, which were annexed to his affidavit, by leaving the same with the defendant at his residence in Demopolis; and at same time shewed him the original subpoena under the seal of the Court,—the order of the 15th of June 1839,—and the copy of the prayer of the bill annexed to his affidavit. That previous to his making such service, he made minute and particular inquiries from A. M., merchant of Demopolis, and T. S., gentleman of Demopolis, from each of which persons he ascertained that the said P. M. Watson so served by him, is the only son of Hugh Watson deceased, who formerly resided at Cartersville; and that he was so informed by the defendant himself, at the time he made such service on him.

The *jurat* of the affidavit stated that same was sworn before J. Burrell, Magistrate and Justice of the Peace for the county of Marengo, State of Alabama; there being no Chief Magistrate in said town or county, nor any civil or military Officer of her Britannic Majesty in said town or county of Demopolis and Marengo, the 6th of January 1840.

RICHARDS, B.†

I think you are entitled to your motion. The 4 & 5 W. 4, c. 82, differs in some respects from the 2 W. 4, c. 33. That act contains a proviso that no process of contempt shall be entered upon any proceeding under it without the special order of the Court; but the 4 & 5 W. 4, c. 82,

1841.
Equity Eccl.
ATKINSON
v.
CALDWELL.

* *Quære*, "or."

† *Solus*.

1841.
Equity Bkch.
 ATKINSON
 v.
 CALDWELL.

does not contain any such clause. It enacts, after providing for the substitution of the service of the subpoena in a very special manner, that it shall be lawful for the Court afterwards, upon affidavit of such service had, to order an appearance to be entered for such party in such manner and in such time as the Court shall direct; and that thereupon it shall be lawful for the Court to proceed upon such service as effectually as if the same had been made within the jurisdiction of the Court. Therefore, when the appearance is entered under the order of the Court, the plaintiff proceeds in the ordinary way. The plaintiff has served the subpoena as directed by the order: and has given the defendant a reasonable time to appear, before he made this application.

Motion granted.

DILLON, by MERRICK her next friend,
 v.

M'CARTHY and DILLON.

Jan. 23.

Bill to fore-
 close a mort-
 gage vested in
 trustees for the
 separate use of
 a *feme covert*.
 The husband,
 who was made
 a defendant, is
 entitled to his
 costs out of the
 fund.

THE bill was filed by a married woman and the trustees of her settlement, against her husband and the mortgagor, to raise the amount of a mortgage settled to her separate use. Upon the final hearing,

Mr. *F. Townsend*, for the defendant Dillon, applied that he might have his costs out of the fund.

The husband could not have been made a co-plaintiff, as he was not interested in the mortgage; nevertheless, he was a necessary party as defendant.

RICHARDS, B.

It is a hard measure to burthen the estate of the mortgagor with the costs of this person; but as he was a necessary party, I think that he is entitled to his costs out of the fund.

1841.
Equity Esch.

M'TIERNAN

v.

A. W. BELL, Executor of ANDREW BELL, and CHRISTIANA
M'TIERNAN, Administratrix *de bonis non* of C. SHADWELL.

Jan. 23.

THE present bill stated, that the original bill in this cause was filed in 1832, by the plaintiffs, against Andrew Bell the only acting executor of C. Shadwell, and J. Campbell, who had been named an executor in the will of C. Shadwell, but who had not joined in taking out probate; and that it prayed an account of the real and personal estate of C. Shadwell; and also for a personal decree against Andrew Bell, charging him with having received assets and misapplied them. Upon the answer of Andrew Bell coming in, whereby it appeared that he was the sole acting executor, J. Campbell was struck out of the bill: and on the 11th of November 1837, a decree to take an account of the real and personal estate of C. Shadwell was pronounced: and it was referred to the Remembrancer to inquire and report whether any of the rents of the lands had been lost by the wilful default of Andrew Bell; and if so, to what amount: and also to inquire and report whether any and which of the securities of the testator had been lost by the default of Andrew Bell; and if so, to what amount: and it was ordered that Andrew Bell should be charged with what should appear to have been so lost by him. After the decree had been pronounced, Andrew Bell died, having appointed the defendant A. W. Bell his executor, to whom probate of the will of A. Bell was afterwards granted. J. Campbell survived Andrew Bell; but having refused to take out probate of the will of C. Shadwell, administration *de bonis non* of her effects was granted to the defendant Christiana M'Tiernan. The bill prayed that the defendant A. W. Bell, as executor of A. Bell, might admit assets; or if not, that an account might be taken of his personal estate: and that the suit and proceedings might be revived as against him, and as against C. M'Tiernan, as administratrix *de bonis non* of C. Shadwell; and that the decree in the original cause might be carried into execution against the defendants, as such personal representatives as aforesaid.

A. W. Bell, by his answer, admitted that he was executor of A. Bell; and that he possessed himself of some of the assets of his testator, but not to a considerable amount; and admitted that assets had come to his hands sufficient to discharge the plaintiff's demand, if any, the defendant being advised that he was not entitled to any demand against the estate of A. Bell. And in another part of his answer, he

Semble, that where a suit abates by the death of a personal representative, the administrator *de bonis non* of the deceased may be brought before the Court by bill of revivor.

A bill of revivor against the executor of a deceased party prayed that he should either admit assets, or for an account. The executor admitted assets sufficient to answer the plaintiff's demand, if any, he being advised that the plaintiff had not any demand against the assets. *Held*, not a sufficient admission of assets; and that an account should be directed.

1841.
Equity Ecch.
 M'TIERNAN
 v.
 BELL.

submitted whether such parts of the assets as had been applied by him in payment of the debts of A. Bell were properly applicable to the payment of the plaintiff's demand, if any.

A question arose, whether it was necessary to set down this cause to be heard.

Mr. J. J. Murphy, for the plaintiff.—The defendant does not by his answer explicitly admit assets; he says he has sufficient to pay the plaintiff's demand, because the plaintiff has no demand against the assets of A. Bell. It was also necessary to set down the cause to be heard as against the administratrix *de bonis non* of C. Shadwell. An administratrix *de bonis non* is not in privity with the former personal representative; and must be brought before the Court by supplemental bill; *Owen v. Curzon* (a); *Lord Lucan v. Latouche* (b).

RICHARDS, B.

I believe it is otherwise in this Court. You may, here, have a rule in the office to revive the suit against the administratrix *de bonis non*. It is, however, unnecessary to decide the point in this case, for there is not a clear admission of assets in the answer of A. W. Bell; and therefore it was necessary to hear the cause against him.

The usual decree was pronounced.*

(a) 2 Vern. 237.

(b) 1 Law Rec. N. S. 166.

* See *per Lord Hardwicke, C.* in *Johnson v. Peck*, 2 Ves. 465. As to the frame of the bill in the principal case, see *Phelps v. Sproule*, 4 Sim. 331.

EYRE v. LYNCH.

BROWNE v. LYNCH.

Feb. 3.

A judgment creditor, who has proved his demand under the decree to account, and who has been paid the sum decreed to be due to him, is bound to execute a warrant of attorney to satisfy the judgment, tendered to him on behalf of the inheritor of the estate decreed to be sold.

Mr. BLAKE, Q. C., for the plaintiff in the second cause, moved that P. Mahony be directed to execute a warrant to satisfy a judgment of 1805, vested in him, under the following circumstances.

The bill in the first cause was filed to raise the amount of a mortgage *puius* to the judgment. To that suit, the plaintiff in the second cause was a party defendant in respect of a mortgage vested in him, which was *puius* to the plaintiff's mortgage. The decree in the first cause merely directed an account of all encumbrances prior to the plaintiff's mortgage. Under that decree, Mrs. Callaghan, the then owner of the judgment of 1805, filed a charge on foot thereof; and by the report,

the estate decreed to be sold.

dated the 24th of December 1829, a sum of money was ascertained to be due to her. The report was confirmed; and a final decree for a sale of the mortgaged premises was pronounced on the 18th of February 1830. The lands were subsequently sold: and on the 29th of February 1835, it was referred to the Remembrancer to report the sums due on foot of the several demands proved in the cause; and to allocate the funds in Court to the payment of the same according to priority. The Remembrancer made his report accordingly; and by an order of the 14th of November 1835, the purchase-money was paid out to the several creditors; and amongst others, Mrs. Callaghan was paid the sum thus ascertained to be due to her.

The bill in the second cause was filed to raise the amount of the *prime* mortgage. To that suit, the persons interested in the judgment of 1805 were not parties. A decree for a sale of the mortgaged premises having been pronounced, they were set up and sold: the purchaser objected that the judgment of 1805 appeared as an encumbrance affecting the estate: and the Remembrancer yielded to that objection. The plaintiff then applied to Mr. Mahony, in whom the legal interest in the judgment was then vested upon certain trusts for the benefit of Mrs. Callaghan, to satisfy the judgment; and tendered to him a warrant of attorney for that purpose, to be executed by him. This, however, Mr. Mahony declined to do; alleging that in the report of the 24th of December 1829, made in *Eyre v. Lynch*, the Remembrancer had made a mistake in point of fact, in allowing to Mrs. Callaghan interest on her demand from the year 1825 only, whereas he should have allowed it from the year 1824.

It appeared that Mrs. Callaghan was entitled to interest on her demand from February 1824; and that the Remembrancer had calculated it from February 1825 only.

Mr. *Maley*, for Mr. Mahony, submitted that as there clearly had been a mistake made in taking the account, and as it could not be rectified without re-hearing the cause, the expense of which would be much greater than the difference of interest to which Mr. Mahony was entitled, the Court would not interfere with his legal rights, but allow him to get his money the best way he could. He did not ask the Court to interfere on his behalf, but merely to remain quiescent.

RICHARDS, B.—If it were necessary for the purposes of the suit in *Eyre v. Lynch*, to compel Mr. Mahony to satisfy the judgment, I would not hesitate in ordering it to be done, although there were a mistake in the report: for I would not permit the report, and the decree and allocation order founded upon it, to be controverted collaterally. If it be alleged that those proceedings were erroneous, they must be set

1841.
Equity Ecch.
EYRE
v.
LYNCH.

1841.
Equity Recd.
 EYRE
 v.
 LYNCH.

right by a substantive application for the purpose. Upon this motion, therefore, I must assume that the report and other proceedings in *Eyre v. Lynch* are correct: but I have some difficulty as to my jurisdiction in this matter. The suit in *Eyre v. Lynch* has terminated; and it is not necessary, for the purposes of that suit, that this judgment should be satisfied. But another suit—*Brown v. Lynch*—has been instituted, to which the persons entitled to the judgment of 1805 are not parties. What jurisdiction has the Court in the latter suit, to order this judgment to be satisfied?

Mr. *Monahan*, Q. C., with Mr. *Blake*, Q. C., for the plaintiff in the second cause.

The application is made in both causes; and the plaintiff in the second cause is a defendant in the first cause. In the first cause, the judgment creditor would be compelled to satisfy the judgment upon the application of the inheritor, Mr. Lynch; for he is interested in having his estates cleared of all encumbrances. So also he would be compelled to do so on the application of Mr. Browne, who represents the inheritor to the extent of his mortgage.

RICHARDS, B.

Mr. Mahony would be ordered to satisfy this judgment, upon an application being made to the Court in the first cause by Mr. Lynch; and it appears to me that the plaintiff in the second cause stands in the same situation, with respect to the motion, as Mr. Lynch. I am not satisfied that Mr. Browne, as a party to the first cause, had a right to insist on this judgment being satisfied: but I agree that the judgment creditor could not be heard, as against the inheritor whose property was sold, to say that he was not bound to satisfy this judgment. Now, it appears to me, that the plaintiff in the second cause is making out the title to the estates decreed to be sold, in the place and stead of the inheritor; and, for that purpose, that he must be considered as invested with all the rights and powers which the inheritor had to clear the title to his estate. Therefore, I will make the order, but without costs as against Mr. Mahony, for there clearly has been a mistake as to the amount of the interest: the plaintiff is, however, entitled to his costs out of the fund.

COURT.—Grant the motion: no costs as between the plaintiff in the second cause and said P. Mahony; the plaintiff to have the costs of this motion out of the fund.

1841.
Equity Ech.

CARNEGIE v. JOHNSON.

Feb. 3.

Per Richards, B.

MR. SMITH, Q. C., for Denroche, a third person, moved that the bill in this cause be dismissed with costs, and that the receiver appointed over the estate of the defendant be discharged, or that the plaintiff do file a supplemental bill against him (Denroche) within a limited time.

Wherever an old interest is transmitted to, or a new interest vested in a new party, after the institution of the suit, strictly speaking that is supplemental matter, although it occurs before issue joined.

In September 1838, the plaintiff filed his original bill against Johnson, for a receiver on a judgment. The defendant did not answer, and the plaintiff obtained an order for a receiver on process. After the appointment of the receiver, the defendant was discharged as an insolvent; and on the 9th of June 1840, Denroche was appointed his assignee.

In some cases, however, the new party has been brought before the Court by amendment.

Denroche, though not entitled to carry the first part of his application, viz., to dismiss the bill, is entitled to be made a party to suit, and to be put in privity with the fund; therefore, the Court will discharge the receiver, unless the plaintiff files a supplemental bill against the assignee within a limited time.—[RICHARDS, B. Certainly.]

Mr. Brewster, Q. C., for the plaintiff, stated, that he had amended the bill, by substituting the name of Denroche for that of Johnson; and that upon this day, the plaintiff had obtained the usual side-bar rule to amend.—[RICHARDS, B. In strictness, the proper course is, to file a short supplemental bill.]—It is a most difficult question, whether a matter which is properly the subject of amendment (issue not having been joined) ought to be introduced by amendment or by supplemental bill.

RICHARDS, B.

Wherever an old interest is transmitted, or a new interest vested in a new party, after the institution of the suit, strictly speaking that is supplemental matter, though it occurs before issue joined. But any other circumstance which occurs before issue joined, if it be not the vesting of a new interest or the transmission of an old interest, is the subject-matter of an amendment. A tenant in tail, who comes into *esse* after the institution of the suit, ought properly to be brought before the Court by supplemental bill; although in Chancery he has been made a party by amendment, where he came into *esse* before issue joined.

COURT.—No rule; the plaintiff undertaking to make the said Denroche a party defendant within a week. And let the plaintiff be at liberty to amend the bill accordingly, without further motion. And let the plaintiff be at liberty to strike the defendant Johnson out of the bill, without payment of costs, unless cause in ten sitting days after service of this order.

1841.
Equity Eccl.

BRADSHAW v. SHORTT.

Feb. 4.

The plaintiff's attorney will be permitted to make copies of deeds lodged in the office, for the purpose of making out title, and will not be obliged to take out office copies thereof.

Semble, that an order of the Court is necessary for the purpose.

MR. SADLER, for the plaintiff, moved that the plaintiff's attorney might be at liberty to make copies of the several deeds and documents lodged in this cause, in order to enable him to proceed with the reference directed by the decree in this cause, respecting the title to the lands of Monea, &c.; or, if the Court should think it proper, that the Remembrancer should be at liberty to hand over said several deeds and documents to the plaintiff's attorney, for the purpose of making copies thereof, on his undertaking to return the same within ten days from the time the same should be handed over to him.

By the decree, it was, amongst other things, directed, that the Remembrancer should inquire and report whether a good title to the lands of Monea could be made to the defendant H. Watson.

The plaintiff's attorney issued a summons in December 1840, to take directions; and the Remembrancer ordered that the defendants Crawford and Ryan, and their attorney, should bring in and lodge all such title-deeds and muniments of title as were in their or either of their possession. Pursuant to that order, certain title-deeds and searches were lodged in the Remembrancer's Office. The attorney for the plaintiff made an affidavit in support of the present application, stating that he was informed by the proper Officer, that he would not be allowed for office copies of those deeds in his costs against the opposite party; and that neither he nor any person on his behalf would be permitted to take copies thereof without an order of the Court for the purpose: and that it would be impossible to proceed with the reference as to the title to the lands, without copies of the deeds. *Hide v. Holmes* (a) was cited.

COURT.—Let the plaintiff's attorney be at liberty to take copies of such of said deeds and documents as the Chief or Second Remembrancer shall think fit, and be allowed against the fund for such copies.

(a) 2 Mol. 372.

1841.
Equity P. Sch.

O'CONNELL v. O'CALLAGHAN.

Feb. 4.

By consent of all parties, dated the 1st of December 1840, and made a rule of Court on the 4th of that month, it was consented, amongst other things, that upon a certain balance being paid to the plaintiff, (and which, it was alleged, had been paid), the bill should be dismissed without farther order. A receiver had been appointed over the premises in the pleadings mentioned; and in the year 1840, part of them had been demised to a tenant for seven years pending the cause.

An application for an injunction to put out of possession a tenant under the Court, the cause having suddenly terminated, must be on notice to the tenant.

Such tenant is in the nature of a tenant at will, and is entitled to emblements.

Mr. *Fremson*, for the defendant, now moved for an injunction to put him into possession of that part of the premises which had been let under the Court. A demand of the possession had been made on the tenant, and he had proposed to the inheritor to continue tenant to him; but no agreement had been entered into between them. No notice of this motion had been given to the tenant, though it had been given to the receiver and the parties in the cause.

PENNEFATHER, B.—The tenant is the person materially interested in this question; and ought to have notice of this application. We deal with tenants under the Court in this respect, as if they were tenants at will; and a tenant at will is entitled to emblements. Therefore, before we permit the injunction to be executed, when the cause is suddenly terminated, we require to be satisfied that no injustice would be thereby done to the tenant.

RICHARDS, B.—And for that reason, we require an affidavit as to the state of the lands, viz., as to whether the tenant has sown any crops, &c.

PENNEFATHER B.—On notice of the motion being given to the tenant, the Court will grant a conditional order for an injunction. The inheritor will not be put to the expense of an ejectment.

No rule.

1840.

Rolls.

JOHNSON v. REARDON.

*April 24.**(In the Rolls.)*

When in consequence of a defect in title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase-money, interest, and taxed costs, without deduction: therefore where the interest and costs are to be paid out of a fund consisting of rents of the lands, the discharged purchaser is entitled to an order including the amount of the Usher's poundage payable in respect of the sum which he is entitled to receive out of the fund.

IN November 1827, certain lands in the county of Cork were sold under the decree in this cause, to Thomas Wise, for the sum of £9000, which he lodged in Court on the 4th of December following, and the sale was duly confirmed; but the money was not invested. After a protracted investigation of the title, the Master reported against it, and by order of the 28th February 1835, Wise was discharged from his purchase, and the Accountant General was directed to draw in his favour for the amount of the purchase-money, and it was referred to the Master to ascertain the sum due to him for interest, and to tax his costs as such discharged purchaser, and to report the funds properly applicable to pay the same. On the 13th June 1836, the Master reported that the sum due for interest and taxed costs amounted altogether to £3689. 10s., and that the funds properly applicable to pay the said sum were, in the first instance, and so far as the same would extend, so much of the stock in bank to the credit of the cause as was equivalent to the sum of £2484. 10s. (being the amount of rents received out of the lands), and that after such application, the sum of £1204. 19s. 11d. together with the amount of his *post* costs when taxed and ascertained would remain due in respect of the interest and costs of the said discharged purchaser, the proper fund for payment whereof would be the future rents, or in case the lands should be resold under the decree before the last mentioned sum, together with the said *post* costs should be fully paid out of the rents, then the proper fund for payment of the same, or so much thereof as should remain unpaid, would be the sum which should be produced by such a re-sale.

By order of the 21st June 1836, pursuant to the foregoing report, the Accountant General was directed to transfer to Mr. Wise so much of the stock as would be equivalent to the sum of £2484. 10s., in part discharge of the said sum of £3689. 10s.; and there being no funds in Court applicable to pay the residue, liberty was reserved to move for such residue, being the said sum of £1204. 19s. 11d., as soon as there should be funds arising out of the said lands. Under this order, Wise received only the sum of £2434. 10s., the sum of £50 having been deducted and retained in the Accountant General's office on account of Usher's poundage. By a further order of the 6th February 1838, the receiver was directed to pay to Wise the sum of £905. 19s. 2d. being the certified balance in his hands of rents received out of the said lands, since the order of the 21st June 1836, on account and in part

discharge of the sum then remaining due to Wise as such discharged purchaser, for interest and costs; and it was thereby referred to the Master to tax his *post* costs, which were accordingly taxed to the sum of £75. 11s. 11d. The lands having been since resold under the decree,* and the purchaser having gone into possession, there was now an application on behalf of Wise, that the Accountant General should, out of the stock in bank to the credit of this cause (being the purchase-money of the said re-sold lands), transfer to him so much of the said stock as at the price of the day would be equivalent to the sum of £424. 12s. 8d., in discharge of the balance of his interest and *post* costs.

1840.
Rolls.
JOHNSON
v.
REARDON.

Mr. *Jenkins*, for the application, submitted, that the only question respecting this balance was, as to the sum of £50 deducted from the amount paid out under the former order on account of Usher's poundage, for which Mr. Wise did not give credit. It was not denied that the fund out of which the payment was made was properly chargeable with Usher's poundage,† but the loss by such charge is not to fall upon the purchaser, and must be borne by the funds in the cause: *Kirwan v. Blake* (a); *Hill v. Kirwan* (b); *M'Cann v. O'Farrell* (c).

Mr. *Herrick*, for the plaintiff, resisted the application as to the £50, and said that there could be no question that the Usher's poundage had been properly deducted, and was established by statute, for the general benefit and protection of parties coming into the Court of Chancery; and that there was no reason why a party coming in to make an advantageous purchase under a decree should avoid the proper charge of an institution of which he had the same advantage as any other suitor. But at all events, that even if he had been entitled to the amount of his interest and costs out of the fund, free of Usher's poundage, he should have guarded his application for the order of the 21st June 1836 accordingly, but having omitted doing so, he ought not now be allowed credit for the deduction.

MASTER OF THE ROLLS.

It is a settled rule that where the title fails, and the purchaser is consequently discharged, he is to be paid the full amount of his purchase-money with interest and costs. The reasons of that rule are obvious. I therefore think, that where such interest and costs are to be paid out of a fund chargeable with Usher's poundage, the loss by the deduction

(a) 1 Hog. 158.

(b) 1 Hog. 175.

(c) 1 Hog. 137.

* See the case *ante*, vol. 2, p. 123.

† See 23 & 24 G. 3, c. 22, and *Smith's Rules*, p. 102.

1840.
Rolls.
 JOHNSON
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 REARDON.

must be borne by the funds in the cause, and not by the discharged purchaser; and I am also of opinion, that the proper time to seek credit for deductions for Usher's poundage from sums previously ordered to such purchaser in part payment of his interest and costs, is when he comes, as in the present case, for payment of the balance of his demand. Therefore,

Let the Accountant General transfer out of the stock in bank to the credit of this cause, to Mr. Wise or his attorney, &c., so much thereof as will, at the price of the day, with the approbation of the Master, be equivalent to the sum of £424. 12s. 8d., together with the costs of this motion.

SARAH CHAPMAN, . . . *Petitioner.*
 JOHN KILLIGREW DUNBAR, *Respondent.*

Nov. 11, 18.

A receiver will not be appointed under 5 & 6 W. 4, c. 55, on the petition of a judgment creditor, over lands which such creditor could not have extended upon an *elegit*, as where the judgment attached only upon an equity of redemption, unless the equitable title to relief is clear. Therefore, a receiver was refused over the possession of a purchaser of the equity of redemption for valuable consideration, where it appeared that the judgment in question, having been entered as against J. D., his full name being J. K. D., was not discovered by negative searches made on behalf of the purchaser for judgments against J. K. D., and there being contradictory affidavits as to the fact of the purchase having been made with notice of the judgment, it also appearing that the legal estate outstanding in the prior mortgage had been assigned to a trustee for the purchaser of the equity of redemption.

THE petition in this matter stated, that on the 15th of July 1828, the respondent John Killigrew Dunbar, then of Garrison, in the county Fermanagh, passed his bond and warrant of attorney for confessing judgment thereon, signed "John K. Dunbar," to the petitioner, in the penal sum of £229. 4s., to secure to her the payment of £114. 12s. with legal interest; that in or as of Trinity Term 1828, judgment upon the bond was entered against the respondent by the name and description of "John Dunbar, of Garrison, in the county of Fermanagh, Esq.," and that there was now due upon it the sum of £202. 1s. 4d. over and above all just credits, &c. The petition further stated, that at the time of the rendition of the judgment, the respondent was, and until the year 1832 continued to be seized in fee-simple of certain lands therein particularly mentioned and situate in the county of Fermanagh; and that in the year 1832, he sold all his estate in the said lands to General Mervyn Archdall since deceased, who by his will devised them to trustees upon certain trusts; and amongst others, to permit Colonel William Archdall to take the rents issues and profits thereof during his life, and that the said Colonel William Archdall, as such devisee, was

now in possession of the said lands ;—that after the said purchase, the petitioner had made several unavailing applications to General Archdall, and since his death to Colonel William Archdall, for payment of the sum due on foot of the judgment. The petition therefore prayed a receiver over the said lands or a competent part thereof, for payment of the said judgment debt and costs.

After the Lord Chancellor's fiat had been obtained upon the foregoing petition, a rule nisi, bearing date the 26th of May 1840, was given as of course in the office,* for the appointment of a receiver pursuant to the prayer of the petition; but by some mistake it was not directed to be served upon any one except the respondent, who being out of the kingdom to avoid service of process, the service was substituted, and no cause having been shewn against the order it was afterwards, on the 24th of June 1840, made absolute as of course; and it was referred to one of the Masters to approve of a proper person to be receiver, and to ascertain a competent part of the lands over which such receiver should be appointed, and, *in case of the respondent or any one on his behalf so desiring it*, to take an account of the sum due to the petitioner on foot of the judgment. The Master made his report under this order on the 26th September 1840, approving of a proper person as receiver—ascertaining a competent portion of the lands over which such receiver should be appointed,—and further finding that he had not taken any account of the sum due to the petitioner, as no desire was expressed by the respondent, or any one on his behalf, that such account should be taken.

No notice was given of any of the foregoing proceedings to Colonel William Archdall or to the trustees of General Archdall's will, but their solicitor having, as it was alleged, accidentally seen a copy of the draft report in the Master's Office, communicated with his clients, and shortly afterwards served a notice on their behalf on the solicitor for the petitioner, calling upon him to vacate all the proceedings taken in the matter, upon the ground of surprise and want of notice to Colonel William Archdall or to the trustees of the will of General Archdall, who were the only persons interested in resisting them. The petitioner's solicitor, in answer, insisted upon the regularity of the proceedings and refused to vacate them. Whereupon, a petition was presented, on behalf of the trustees and devisees of General Archdall, praying that the absolute order for the appointment of a receiver and the subsequent proceedings might be set aside, and that they might be at liberty to shew cause against the conditional order. The matter now came before the Court on notice of motion upon this latter petition, and upon a cross notice on behalf of the petitioner Sarah Chapman of an application that the Master's report might be confirmed.

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* According to the practice of this Court.

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In support of the application to confirm the Master's report, Miss Chapman the petitioner, and Mrs. Dunbar the respondent's wife, made affidavits, from which it clearly appeared that the sum claimed by the petitioner was fairly due to her on foot of the judgment; the certificate of the entry of which in Trinity Term 1828, was produced to the Court. The affidavits of Miss Chapman and Mrs. Dunbar further charged, that at the time of the purchase and before payment of the purchase-money, both the solicitor for the vendor and the solicitor for the purchaser concerned in the transaction, had actual notice of this judgment, and a variety of circumstances were set forth, from which it would appear that the solicitors concerned must have had such notice.

On the part of the trustees and devisees of General Archdall, it appeared that before the sale there were the usual negative searches for judgments against the vendor "John Killigrew Dunbar," and that the judgment in question was not discovered by those searches;—that all the debts and encumbrances affecting the estate and appearing upon the searches were paid off out of the purchase-money, viz., £17,000, and a considerable balance paid over to the vendor. The present solicitor for the trustees of General Archdall's will, who had been the General's law agent and transacted the purchase for him, positively stated, by affidavit, that neither he nor General Archdall had any notice or intimation of the petitioner's judgment for some months after the balance of the purchase-money had been paid over to Dunbar, and the General had gone into possession of the estate. It further appeared* that in the year 1765, George Dunbar the respondent's father, under whom he derived as heir-at-law, in consideration of £1000 mortgaged the lands in fee, and that this mortgage afterwards became vested in one Blackall, to whom, in the year 1824, the respondent mortgaged the equity of redemption for £8000;—that in pursuance of the agreement between the respondent and General Archdall, the sums due upon those mortgages respectively were advanced by General Archdall to Blackall out of the purchase-money, and that the mortgages were thereupon assigned to a trustee for General Archdall, in order to protect his purchase from the respondent against undiscovered encumbrances of later date; and that the legal estate outstanding in mortgage long prior to the petitioner's judgment was still subsisting and vested in the said trustee.

* The fact of the outstanding legal estate prior to the judgment, came by surprise upon the petitioner's Counsel, as, when the case was first mentioned, it did not appear upon any of the documents before the Court; but when it was stated by Counsel, the *Master of the Rolls* allowed the case to stand over for an affidavit upon the subject; which was accordingly made, and, with the deeds, furnished to his Honor without further discussion.—When the mortgagor is in possession, this Court, it seems, will appoint a receiver, under the Judgment Act, over an equity of redemption: *Smith v. Egan*, 5 Law Rec. N. S. 247; but as to a case like the present, see 1 *Sand. on Uses and Trusts*, 275 (4th ed.); *Hunt v. Coles*, Com. R. 23; *Lyster v. Dolland*, 3 Bro. C. C. 478.

Mr. *Blake*, Q. C., and Mr. *Isidore Blake*, for Sarah Chapman.

Mr. *Litton*, Q. C., and Mr. *William Brooke*, Q. C., for the trustees and devisees of General Archdall.

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MASTER OF THE ROLLS.

This is a judgment creditor's petition, under the 5 & 6 W. 4, c. 55, for a receiver over certain lands, of which the respondent is alleged to have been seized in fee at the time of the rendition of the judgment. The petition states, that in July 1828, the respondent John Killigrew Dunbar, then of Garrison, in the county of Fermanagh, passed his bend and warrant for confessing judgment thereon to the petitioner, signed "John K. Dunbar," and that the judgment in question was entered on that bond as against "John Dunbar, of Garrison, in the county of Fermanagh, Esquire," as of Trinity Term, 1828. It is further stated in the affidavits made to support the petitioner's present application, that upon the sale of the respondent's estate to General Archdall in the year 1832, and before the purchase was concluded or the purchase-money paid, Mr. M'Guire, who conducted the sale as the agent and solicitor for the respondent, and Mr. Collum, who was the agent and solicitor for General Archdall, in the transaction of the purchase, had full notice of the petitioner's judgment. But upon the other hand, Mr. Collum appears upon this motion, and, admitting that he was the solicitor through whose agency the purchase was made by General Archdall, positively denies that either he or General Archdall had any notice of the petitioner's judgment until some months after the purchase had been concluded, and the whole of the purchase-money had been paid. He further states, that there were negative searches for judgments against the vendor John Killigrew Dunbar, upon which this judgment did not appear;—that after applying the purchase-money in payment of all the discovered debts, a considerable balance, far exceeding the amount of the petitioner's demands, was paid over to Dunbar: and by a supplemental affidavit, Mr. Collum now adds, that the legal estate in the lands was outstanding in mortgage long prior to the date of the petitioner's judgment, and that a conveyance was taken from the mortgagee to a trustee for General Archdall, as a protection against latent encumbrances.

It does not appear, from any document now before me, that the petitioner's judgment was at any time docketted.*

I think it is clear, from the affidavits in this case, that the respondent

* The fact of the judgment being docketted or undocketted, though a natural subject of remark, could not, it would seem, make any difference in this case. There can be little doubt, that the purchaser would be liable to the judgment, though undocketted, if he had *actual* notice of it when he made the purchase: *Le Neve v. Le Neve*, 3 Atk. 646;

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was, at the time of the sale of his estate to General Archdall, fairly indebted to the petitioner under this judgment, and that her present demand on foot of it is fairly due to her. But the persons who now represent General Archdall insist, and, I think, properly insist, that as the legal estate in the outstanding mortgage prior to the petitioner's judgment is now vested in their trustee, and as they are (according to their statement) purchasers for full value of the respondent's equity of redemption without notice of the petitioner's demand, it would be unreasonable to put them to file a bill to get rid of this judgment, and they are entitled to rely upon the prior legal estate, and their equity as purchasers, without notice, as a defence against a summary proceeding of this kind by the petitioner for the appointment of a receiver over their possession. I yield to that argument the more willingly upon the present occasion, and suffer my judgment to be governed by the consideration of strict legal rights, because it appears in this case that a loss must be sustained by either of two innocent parties; as, upon the one hand, there can be little doubt that Miss Chapman's demand is fairly due, and that unless recoverable out of this estate it will be lost; and upon the other, it would certainly be very hard if General Archdall, or those representing him, after having made their purchase with due caution, and discharged all the encumbrances affecting the estate, so far as they were discoverable by ordinary diligence, or the purchaser knew of them, and afterwards paid the balance of the purchase-money, amounting to a considerable sum, to the vendor, should now be compelled to pay the debt due to the petitioner—in fact, to pay that sum twice.

I will therefore refuse this application for the appointment of a receiver, and leave the petitioner, in case she shall be so advised, to institute a suit for the purpose of having her judgment declared a charge upon this estate; and I have the less difficulty in doing so, because, if the facts stated in the petition and affidavits be substantiated, there cannot be the slightest doubt that this judgment debt will and must be paid by the trustees of General Archdall. Even if a portion of the petitioner's present case be established, it will be impossible for them to get

Davis v. Strathmore, 16 Ves. 419; *Tunstall v. Trappes*, 3 Sim. 386; notice to his solicitor would be actual notice to himself: *Doe v. Allsop*, 5 B. & Ald. 142; *Wyatt v. Barwell*, 19 Ves. 435; *Tunstall v. Trappes*, 3 Sim. 386; and the notice to the solicitor need not have been in the same transaction: *Hargreaves v. Rothwell*, 5 Jarm. Conveyg. (3rd ed.) 489; *Nixon v. Hamilton*, 1 Ir. Eq. Rep. 46. On the other hand, it is clear that the docketing of the judgment, would not *per se* operate as notice; and that the prior legal estate would be a complete protection to a purchaser of the equity of redemption for valuable and adequate consideration, against a judgment of which he had not notice: *Willoughby v. Willoughby*, 1 D. & E. 763; *Tunstall v. Trappes*. See the subject very fully discussed, 1 *Pow. Mortg.* c. 10, in *notis*, pp. 276, 307; 5 *Jarm. Conveyg.* (3rd ed.) pp. 39, 44, *et seq.*

rid of it. On the other hand, if the case made by Mr. Collum's affidavit be sustained, it would, perhaps, have the effect now contended for by those deriving under General Archdall. But I do not now decide any thing with respect to that; all I decide upon this motion is, that this is not a case for the appointment of a receiver on a summary application of this kind; and I do so expressly, without prejudice to any proceedings this lady may be advised to take for payment of her demand.

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ORDER :—Discharge the order of the 24th of June 1840, for the appointment of a receiver over the lands in the petition, and in the report of the 26th of September last, made in pursuance thereof; and allow the cause shewn against the conditional order of the 26th of May last, without prejudice, however, to such other proceedings, either at Law or in Equity, as the petitioner Sarah Chapman may be advised to take for recovery of the sum due on the judgment in her petition mentioned to have been obtained against the respondent John Killigrew Dunbar; and let the parties abide their own costs of the proceedings in this matter, unless the petitioner Sarah Chapman shall establish in some other proceeding her right to levy the amount of the sum due on the said judgment, out of the estates which formerly belonged to the respondent in this matter, and which were purchased by the late General Mervyn Archdall from him; in which case, she is to have, in addition to the sum due on said judgment, the costs incurred by her in proceeding in this matter.

CREED v. CREED.

MR. SERJEANT GREENE, with whom was Mr. *Blackburne*, Q. C., moved, on behalf of Richard Wilson, late tenant of the lands of Meadough in the county of Limerick, sold under the decree in this cause, that George Gubbins the purchaser, should pay to the said Wilson the sum of £245, being the ascertained value of twenty acres of oats sown by Wilson while tenant under the Court, and growing on the lands when Gubbins

Nov. 27.

Where lands, let under the Court for seven years pending the cause, are sold under the decree and the tenancy is determined before the expiration of the

term, the purchaser having notice of the tenancy at the time of the sale, and going into possession, is not entitled to the crops sown by the late tenant and growing on the lands; the late tenant is entitled to emblements, and his right is not affected by the custom of country as to the outgoing tenant's right after the expiration of his lease:

Seemle, if, in such case, the purchaser insists upon retaining the crops, the Court will direct a reference at his expense as to the value of the crop and the damage sustained by the late tenant in relation thereto.

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as such purchaser obtained possession thereof under the injunction issued for that purpose ; or, for a reference as to the value of the said crops, and the damage sustained by Wilson in relation thereto.

It appeared, that, in the year 1836, the lands in question were let under the Court to one Edward M. Creed, for seven years pending the cause, at the rent of £2. 15s. per acre ; but on condition, subject to penalties, that no part of the said lands should be broken up or used in tillage during the term, and that such of them as were then broken up should be laid down. Creed, being closely connected with the parties in the cause, was permitted to go into and continue in possession without taking out a lease, or giving the usual security ; and while he continued tenant, he tilled the lands notwithstanding the conditions imposed upon him, and sublet parts of them to several persons, and amongst others to Mr. Gubbins, subsequently the purchaser under the decree. In September 1838, the rent being then heavily in arrear, the receiver distrained upon the lands, and the principal distress was on the farm sublet to Gubbins, on which there was a valuable stock of horned cattle. The receiver, being a friend of the parties, and anxious if possible to avoid extremities, suggested and was party to an arrangement between Creed, the then tenant under the Court, and Wilson, the present applicant, whereby it was agreed that Creed should assign to Wilson, who should stand in his stead as tenant under the Court, and hold the lands during the continuance of the term, giving due notice to the undertenants ; but upon the terms that there should be a formal sale of the distress, at which each of the undertenants should be at liberty to buy in their several shares of the stock for the sums due from them respectively for rent under their contracts with Creed ; and that Wilson should forthwith pay the difference between the sum so to be collected and the amount of the arrears of rent due from the tenant under the Court—the difference being the sum of £91. 7s. 6d.—and be responsible for the half year's rent to be due in November then next, and the future accruing gales during the tenancy. That arrangement was accordingly carried into effect ; Wilson thereby became tenant in Creed's stead, and continued to till the lands just as Creed had done, and in the Spring of 1840, broke up twenty acres of pasture and sowed them with oats.

It appeared that Gubbins continued to hold the farm sublet to him for a year after this arrangement and paid his rent to Wilson accordingly ; and it further appeared that the rent reserved upon the original letting under the Court was punctually paid by Wilson to the receiver up to and for the 1st of May 1840.

On the 8th of May 1840, the lands were advertised to be sold under the decree, and accordingly were sold on the 5th of June following to Gubbins ; and the title having been approved, the conveyance to him was executed on the 25th of the same month, and on the 25th of July

1840 he issued his injunction and was put into possession of the entire of the lands by the Sheriff of the county Limerick. Thereupon, a controversy arose between him and Wilson respecting the twenty acres of oats then growing upon the lands; each insisted that they were his; but Gubbins offered Wilson the value of the labour and seed he had expended upon them. That offer having been declined, as the harvest time drew near, the parties by consent named two persons to value the crop without prejudice to the rights of either; and in order to prevent the serious conflict and breach of the peace likely to ensue if each party insisted upon sending his reapers to take the crop, it was further agreed that the crop should be saved and taken by Gubbins, in like manner without prejudice to the rights of either party, and that a case to be approved by both parties should be prepared for the opinion of Mr. Serjeant *Greene*, which should be conclusive. The crop was accordingly valued at £245, and it was saved and taken by Gubbins, but as there was considerable delay about the preparation of the case, and neither party seemed likely to approve of the other's version of it, Wilson now made his present application to the Court.

It did not appear that any objection had been raised by the receiver in the cause, or any other person, to the course of husbandry pursued by Wilson; and he now positively stated by affidavit, that when he undertook to stand in Creed's place as tenant under the Court, he was not apprised, and never knew until lately, that the tenancy was created subject to any conditions against tillage, and that he could not have been induced to accept the tenancy upon such conditions, and subject to Creed's liabilities for the rent due. He further stated, that when he took upon him Creed's liabilities for the rent, and entered upon the tenancy, he had no idea that it was to be determined so soon; and that even giving credit for the £245, the value of the oat crop, he he had lost largely by the transaction.

Upon this state of facts, it was insisted, on Wilson's behalf, that he should be considered as having been the tenant under the Court;—that under the circumstances, he was in no wise to blame for having tilled the land; but that even if there had been a lease in the case, and an express covenant against tillage, for the breach of which an action might be maintained, still that could not deprive the tenant of his right of emblements, where his tenancy had been abruptly determined by the act of the Court: *Boraston v. Green* (a). Had the term expired, the tenant would be entitled to the away-going crop, according to the custom of the country: *Holding v. Pigott* (b).

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(a) 16 East, 71.

(b) 7 Bing. 465; S. C. 5 M. & P. 427. See the cases collected, in 4 *Jarm. Conveyg.* (3d ed.) pp. 511, 513.

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Mr. *Henn*, Q. C., and Mr. *Jenkins*, for Gubbins, submitted that the dealings between Creed and Wilson, without the sanction or knowledge of the Court, could not give the latter any title as tenant; and that at best, his title could be only as Creed's assignee, subject to the special covenant against tillage. That the breaking up twenty acres of pasture land was a tortuous act, of which the Court ought not to give the offending party any benefit, and that the value of the oat crop would not compensate the purchaser for the injury thereby done to the property. That under the circumstances, the purchaser's offer, of the value of the seed and labour expended, was liberal, and that at any rate, Wilson could not be entitled to the whole crop, as, according to the custom of the county of Limerick, the outgoing tenant is entitled only to one-half of the away-going crop.

MASTER OF THE ROLLS.

I have not the least doubt as to this case, nor as to the proper order to be made in it.

It is not necessary, on this motion, that I should consider what the consequences may have been, if the parties whose rights were prejudiced by breach of the conditions of the letting under the Court, had thought proper to make an application upon the subject in reasonable time; nor that I should now enter into the merits or demerits of the transaction between Creed and Wilson: for whatever reason others may have had to complain, the purchaser has none; and I cannot help thinking that his objection upon such grounds comes with rather an ill grace, and for the purpose of propping up a very inequitable case. Mr. Wilson positively states in his affidavit, that when he was induced to advance his money for the rent due from Creed, and to take Creed's place as tenant under the Court, he was not apprised of the conditions against tillage, and never heard of them until lately. The assignment from Creed to Wilson was with the privity and consent of the receiver in the cause, and under circumstances which raise a strong equity in Wilson's favour. Thenceforth, he was recognised and treated by the receiver as the tenant, and regularly paid the rent reserved by the Court up to the 1st of last May; I am, therefore, clearly of opinion that his title as tenant cannot be disputed upon this motion.

In the month of June last, the lands were sold under the decree to Mr. Gubbins; and it appears that he was not only fully aware of their existing condition, and of Wilson's tenancy, at the time of the sale—that in the preceding months of January and February, Wilson had sown the twenty acres of oats—but that the lands having been in the immediate neighbourhood of Mr. Gubbins' residence, he probably was an observer of every change of their condition, from the commencement of the tenancy under the Court, and, from the first, had

full knowledge of the assignment from Creed to Wilson, and perhaps, under the circumstances, was the person who was most interested in and benefited by it. Within a month after the sale, the title was investigated and approved, and the conveyance to the purchaser was executed. While I give its due praise to the despatch with which the matter was concluded, and recommend it as an example worthy of imitation in other cases, I must regret that I cannot equally recommend the motive which appears to have produced it in the present instance; as, in the events that have happened, I cannot avoid perceiving that such motive was the hope of ousting the tenant under the Court of his right to the valuable crop of oats which his labour and cost had produced upon the lands, by suddenly determining the tenancy, and going into possession. There is a vulgar notion, that a purchaser going into possession by injunction, is thereby entitled as of course to the crops then growing upon the lands. I cannot imagine in what it originated; nothing could be much more unjust, or repugnant to the principles of law. Wherever a tenancy is abruptly determined by the landlord—as in the present case, where the Court was in the situation of landlord, and by perfection of the sale under its authority within the term conditionally given to the tenant, the tenancy was determined—in every such case, the tenant has the full right of emblements, unaffected by particular custom. The question here is not between an outgoing and incoming tenant, but between an outgoing tenant under the Court, and a purchaser under the decree. The custom of the place or county where the lands are situated, applies where the tenancy has determined by expiration of the term, and the tenant should not otherwise be entitled to emblements, as the crop was sown with full notice of the time when he should go out (a); but when the tenancy is determined, not by the expiration of the term originally given, but by the act of the lessor, the tenant must have his emblements at common law.

I must therefore either order the purchaser to pay to Mr. Wilson the sum of £245, being the value of the oat crop ascertained by consent; or, if Mr. Gubbins desires it, I will, at his expense, refer it to the Master to inquire as to the value of the crop, and the injury sustained by Mr. Wilson in relation thereto.

[Mr. *Jenkins* having, on behalf of the purchaser, chosen the order to pay the money] :—

ORDERED :—That the said George Gubbins pay to the said Richard Wilson, the former tenant under the Court, the sum of £245, being the value of the crop growing on the lands in the notice mentioned, at the time that the said George Gubbins went into possession of the said land; and also pay to the said Richard Wilson the sum of £18 for the costs of this motion.

(a) Co. Lit. 55. a.

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SANDFORD v. SEYMOUR.

(In Chancery.)

Jan. 14 & 15.

A decree in a suit instituted against an executor by a simple contract creditor, of the testator for payment of his own debt merely, directing the executor to pay out of the assets of the testator, does not give any priority over outstanding specialty creditors, of whose debts the executor has notice. Such a decree is analogous to a judgment at law of assets, *quando acciderint*.

THE bill in this case was filed on the 9th of July 1823, by Patrick Sandford, and Margaret his wife, against the defendant Thomas Seymour, as executor of his father Thomas Seymour, who had been the executor of James Lennon, for an account of the personal estate of James Lennon which came to the hands of Thomas Seymour his executor, or without his wilful default might have been received by him; and also an account of the personal estate of Thomas Seymour the elder which had come to the hands of the defendant Thomas Seymour, the plaintiffs claiming to be entitled to a moiety of the estate of James Lennon, in right of plaintiff Margaret his daughter.

The defendant in his answer set out the specialty debts of his testator, as they appear upon the Master's last report hereinafter referred to. The decree was pronounced on the 27th of February 1824, referring it to the Master to take an account of the personal estate of James Lennon deceased, and by whom received, and of his debts, legacies, and funeral and testamentary expenses; and if it should appear that any part of such personal estate had been lost by the wilful default of his executor Thomas Seymour the elder, then the Master was to report same specially: and if the Master found that Thomas Seymour the elder was indebted on account of such personal estate at his death, then he was to take an account of his personal estate. The Master made his report under that decree, on the 28th of December 1831, annexing to it fifteen schedules, ten of which related to the estate of Lennon, and five to the estate of Thomas Seymour his executor.

The 13th schedule, to which that report referred, contained an account of the outstanding assets of Thomas Seymour the elder, which amounted to £7233. 15s. 9d., and the 15th schedule contained an account of the sums due to the defendant Thomas Seymour, as executor of his father, for disbursements made by him beyond his receipts. The sums expended by him were stated to amount to £4866. 18s. 1½d., but no specification was given of the manner or the account on which they had been expended, and his receipts were stated to amount to £2686. 19s. 1d., both Irish currency, leaving a balance in his favour of £2030. 14s. 5d. present currency. Exceptions were taken to that report, both by the plaintiffs and the defendant, which it is unnecessary to state, and on the 3rd of February 1834, further inquiries were directed.

The Master made his report in pursuance of that decretal order on the 15th of April 1835, and the cause coming on to be heard on the 5th

of June 1835, a final decree was pronounced; whereby it was declared "that the plaintiffs in the cause were entitled to be paid the sum of £114. 2s. 5d., which will remain due to them after the deduction specified in the Master's report, out of the assets of Thomas Seymour deceased, in said report mentioned, as outstanding at the date of such report, when the same shall be received by the defendant Thomas Seymour." And the defendant Thomas Seymour was directed, within one month from the date of the decree, to file an affidavit stating the particulars and amount of the sums received by him out of the outstanding assets of Thomas Seymour deceased, since the receiving of his answer to the personal interrogatories, exhibited to him in the cause. The plaintiffs were also declared entitled to their costs in the cause, out of the assets of Thomas Seymour deceased.

Pursuant to the direction in the final decree, the defendant Thomas Seymour made an affidavit specifying the sums received by him out of the outstanding assets of Thomas Seymour, since the swearing of his answer to the personal interrogatories, and also specifying the assets of Thomas Seymour deceased, then outstanding, and in that affidavit he claimed to be entitled to interest on the advances made by him on account of the assets of his testator, on the ground that they had been paid in discharge of debts of the testator, bearing interest; and for which proceedings were threatened to be taken.

On the 14th June 1836, the plaintiff served notice of an application, for a reference to inquire whether any, and which of the outstanding assets of Thomas Seymour the elder, mentioned in the 13th schedule to the report of 28th December 1831, had been called in or received by the defendant Thomas Seymour, and whether any, and what proceedings should be taken, and by whom, to call in such of said assets as were still outstanding. On the same day the defendant served a cross-notice of an application, that in addition to such reference the Master should also inquire and report the priorities of the several creditors who claimed any portion of said testator's assets, and also what interest the defendant was entitled to on foot of the balance appearing by the report and decree to be due to him. Both motions came on, on the 25th June 1836, when it was referred to the Master to inquire and report whether any and which of the outstanding assets of Thomas Seymour deceased, mentioned in the 13th schedule to the Master's report of the 28th of December 1831, had been called in and received by the defendant Thomas Seymour, or any person for his use; and whether any and what proceedings ought to be taken to call in such outstanding assets; and also to take an account of all outstanding demands affecting the assets of said Thomas Seymour, and to report the particular nature and priority of the said demands respectively; and both motions were directed to stand over until after the return of the report.

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The Master made his report pursuant to said order on the 18th November 1840, finding that several of the outstanding assets of Thomas Seymour, mentioned in the 13th schedule to the report of December 1831, sums amounting to £4122. 3s. 8d., had been called in and received by the defendant Thomas Seymour; and that the outstanding demands against the assets amounted to £5677. 5s. 11d. The Master found that a judgment obtained by Julia Barrett against Thomas Seymour deceased, was the first demand, and save as to the sum due to the plaintiffs (as to which he submitted the question to the Court), that the next was a sum of £2500, late currency, due to Peter Lambert by virtue of covenants contained in a settlement executed on the 3rd of February 1810, upon his marriage with one of the daughters of the said Thomas Seymour, with the interest that had accrued due thereon.

The report further found a sum of £400 Irish, due to defendant as surviving trustee of a settlement executed on the marriage of another of the daughters of said Thomas Seymour deceased, with the interest thereon, to be the third in order of priority (subject to the opinion of the Court upon plaintiff's claim), and the sum reported due to defendant for disbursement on foot of the assets to be the fourth, with the like reservation of plaintiff's claim.

As to the demand of the plaintiffs, the report found that there was due to them the sum of £114. 2s. 6d., together with their costs in the cause out of the assets of Thomas Seymour, but in what priority the Master submitted the same to the Court.

On the 25th of November 1840, the plaintiffs moved that the report should stand confirmed, and that they should be paid the sums decreed due to them in priority to the specialty debts mentioned in the report. The defendant moved at the same time, that the specialty debts should be paid in priority to the plaintiffs.

The LORD CHANCELLOR, on the motion being opened, directed that the cause should be set down on the Master's report.

Mr. *Blackburne*, Q. C., and Mr. *Blake*, Q. C., for the plaintiff, contended, that from the time the decree was pronounced, the plaintiff had obtained priority over the other creditors of the testator; that the character of the debt, when the decree was pronounced, was to be regarded in determining the priorities of creditors, and not its character at the death of the testator, and that a decree here was equal to a judgment at law; and they cited *Morice v. Bank of England* (a); *Addis v. Powell* (b); *Foley's case* (c); *Anonymous* (d); *Mason v. Williams* (e);

(a) 3 Swans. 573.

(b) 1 Ves. sen. 495.

(c) 2 Free. 49.

(d) 3 Salk. 83.

(e) 2 Salk. 507.

Edgecomb v. Dee (a); *Largan v. Bowan* (b); *Martin v. Martin* (c);
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Mr. Warren, Q. C., Mr. W. Brooke, Q. C., and Mr. Armstrong, for the defendant, contended, that a decree for payment of a single debt did not affect the priorities of the other creditors; and that the executor, if compelled to pay the plaintiff's debt, which was originally only a simple contract debt, after he had notice of outstanding specialty debts, would be liable to pay the amount over again; and they cited *Martin v. Martin* (c); *Sawyer v. Merce* (f); *Oxenham v. Clapp* (g); *Nunn v. Barlow* (h); *Handcock v. Prowd* (i); *Comyn's Digest* (k); *Atkin v. Urton* (l); *Britton v. Bathurst* (m); *Davis v. Monkhouse* (n); *Hawkins v. Day* (o); *Davis v. Blackwell* (p). As to the point of interest upon the advances made by the executor, they relied on *Small v. Wing* (q), where interest was given to an executor upon advances made in payment of debts that bore interest.

The LORD CHANCELLOR.

I must rule this special point in favour of the defendant. If this bill had been filed for a general administration of the assets of the testator, the course that would have been pursued is perfectly clear. An account of all the debts of the testator would have been directed, the executor would have shewn debts outstanding, and the Court would not have pronounced any decree for the payment of the plaintiff, until it had been ascertained that there were assets of the testator available for the purpose. But here the case is not so: the bill is filed merely for the recovery of this particular debt, and the decree must be considered with reference to the state of things at the death of the testator, and not at the time when it was pronounced.

Here, then, is a bill filed for a particular debt; no account is sought by it of the other debts of the testator, and no inquiry directed, whether the assets would reach the plaintiff's debt. When this is the case, the decree which is pronounced is in the nature of a judgment at law of assets *quando acciderint*. The decree directs that the plaintiff shall be paid, but paid only out of the assets, which are to be applied in a

- (a) Vaughan, 94.
- (c) 1 Ves. 210.
- (e) 1 Ves. sen. 213.
- (g) 2 B. & Ad. 309.
- (i) 1 Saund. 328.
- (l) Comb. 318.
- (n) Fitzgib. 76.
- (p) 9 Bing. 10.

- (b) 1 Sch. & Lef. 299.
- (d) 1 B. C. C. 185.
- (f) 1 T. R. 690.
- (h) 1 Sim. & Stu. 580.
- (k) Pleading, T. D. 9, p. 811.
- (m) 3 Lev. 119.
- (o) Ambler, 803; Blunt's edition.
- (q) 5 B. P. C. 66.

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due course of administration ; and, under that decree, the plaintiff comes in for payment of his debt in the regular order of administration. If that were not the case, gross injustice would be done. The plaintiff does not bring the other creditors before the Court ; no inquiry is directed respecting the outstanding debts ; and if the decree directed the executor to pay absolutely, in all events, without reference to the state of the other debts, or the state of the assets, the authorities that have been cited in the course of the argument shew, that he would be liable to pay the amount over again to the other outstanding creditors of a higher degree, and that without giving the executor an opportunity of proving the existence of those debts.

There is a close analogy between the proceedings here and the course at law. There, the course of proceeding is well ascertained ; the executor pleads that there are outstanding debts of his testator of a higher nature than that on which he is sued, and that he has not assets to satisfy both ; and the plaintiff, if he admits the existence of the debts set up by the executor, and the deficiency of the assets, takes judgment for payment of his debt, out of the assets, when those of a higher nature are satisfied. Here the proceeding is precisely analogous, and the executor states in his answer, that there are other debts of the testator of a higher nature.

If at law, when sued, he had not set up such a defence by his pleading, he would have made himself liable both to the plaintiff in the action and to the other creditors, and such a course is quite consistent both with reason and justice. But here he says in his answer, "you are entitled to be paid your debt, but you are only entitled to it in a due course of administration ;" and then he sets out other debts of a higher nature, which are outstanding, and says, that so far as he has assets applicable to the payment of the plaintiff's demand he is answerable, but no farther. The decree declares the plaintiff entitled to his demand, but entitled to it only in a due course of administration. It does not decide the plaintiff is entitled to be paid in all events, whether there are assets or not, nor does he put such a construction upon it himself. He thinks it necessary to ascertain whether there are any outstanding debts, and the order of July 1836 directs such an inquiry. If this had been a decree against the testator himself, it would have been altogether different ; but to say that a decree against an executor, obtained in the suit of a simple contract creditor of the testator, is to control the claims of the specialty creditors and give priority to the simple contract creditor, or make the executor liable for the amount, appears to me completely subversive of justice and common sense, and of the principles upon which this Court has uniformly acted.

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EMANUEL HUTCHINS, Plaintiff;
 RICHARD HUTCHINS, Administrator, and THO-
 MAS HUTCHINS, Heir-at-Law of ARTHUR
 HUTCHINS, deceased, Defendants.

(In the Rolls.)

Nov. 11, 12.

AFTER the order made in this cause on the 4th July 1839, upon the application of certain tenants of the lands in the pleadings mentioned (see the case *ante*, 1 *Irish Eq. Rep.* 378, 380), on the 13th of the same month, a consent was entered into by the tenants and the parties in the cause, whereby it was agreed that the former should waive the costs given to them by the above-mentioned order, on condition that the Master should be at liberty to proceed with the reference, notwithstanding the discharge of the receiver, and that the question as to the costs of the proceedings should abide the return of the Master's report. That consent was made a rule of Court on the 9th of December 1839. Afterwards, when the tenants returned into the Master's Office, to continue their proceedings upon the reference, it was discovered that the plaintiff in the cause had died at Damascus, in the month of November 1839; and his representatives and the surviving parties in the cause having refused to revive it, the Master declined to proceed upon the reference, in consequence of the abatement.

Mr. B. C. Lloyd, for the tenants, now moved that Samuel Hutchins, the late receiver in this cause (who now claimed to be entitled, under the will of the late plaintiff, to his interest in the lands in the pleadings mentioned), and Thomas Hutchins and Richard Hutchins, the defendants in this cause, or such of them as to the Court might seem proper, should pay to the said tenants respectively the costs by them incurred in obtaining the order of reference of 21st July 1838 (the original order of reference), and of the proceedings thereunder; and also the costs incurred by them respectively in obtaining the order of the 4th of July 1839, and the consent order of the 9th of December 1839, and this motion.—Mr. Lloyd dwelt much upon the hardship of this case, and submitted that although he could not, under the circumstances, press

In consequence of a controversy between the receiver and tenants under the Court, the latter came in and took a reference upon the subject, at their own expense. After the proceedings under the reference had gone to a great length, it appearing that the Master would report in favour of the tenants, the parties in the cause, by consent, discharged the receiver, in order to prevent the report from being made up. The Court, under the circumstances, ordered the plaintiff and defendant to pay to the tenants all their costs of coming into Court, and of the reference, &c. Afterwards, a consent was entered into, and made a rule of Court, where-

by the tenants waived the costs so ordered, upon the terms that the Master should be at liberty to continue the reference, notwithstanding the discharge of the receiver, and that the question of costs should abide the coming in of the report. Before the proceedings under the reference could be renewed, the suit abated by the death of the plaintiff, and the parties refused to revive the cause. There was now an application, under the circumstances, that the person entitled under the plaintiff's will to his interest in the cause, in respect of a valuable chattel real, which was the subject of the suit, and the defendant, or either of them, should pay to the tenants the costs formerly ordered, and those since incurred:—*Held*, that the Court had not jurisdiction to make any order in the case.

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for an order against the representatives of the deceased plaintiff, he thought an order for the costs might be made against Richard Hutchins, the principal defendant, who, with the plaintiff, had been directed by the order of the 4th of July 1839, to pay the costs then incurred by the tenants.—It did not appear that any of the costs had been as yet taxed or ascertained.

MASTER OF THE ROLLS.

I think that in *Barry v. Stawell* (a), I stretched the jurisdiction, as far as I could, to meet the justice of the case; but the present application seems to go a step further, and to fall precisely under the authority of the rule in *Jupp v. Geering* (b). I would be very glad to go with you in this case if I could, as it seems to be one of great hardship on the part of the tenants, and I will take home the papers and consider it, before I make any decision upon it; but I fear I have no jurisdiction.

In a day or two afterwards, his HONOR stated that he had considered the case, and was of opinion, that the cause having abated, he had no jurisdiction in it. The notice of the application was therefore struck out.*

(a) *ante*, 18.

(b) 5 Mad. 376.

* Two or three consequences, requiring particular notice, appear to follow from this case.—First, it distinctly sets up the authority of *Jupp v. Geering* (5 Mad. 376), which, it is believed, was generally supposed to have been shaken to its foundation, by his Honor's judgment in *Barry v. Stawell* (*ante*, 18); and secondly, it reduces the decision in the case last mentioned to little more in effect than a simple affirmation of the rule in *Kemp v. Mackrell* (3 Atk. 812, 2 Ves., sen., 580), and *Johnson v. Peck* (2 Ves., sen., 465). That his Honor clearly shewed the case of *Barry v. Stawell* to be within the exception, cannot be denied; but certainly there were passages in the judgment which seemed calculated to leave the impression that more than this was intended, especially when the language of the Court upon other occasions was taken into account; and it is believed that the judgment was generally received as a masterly vindication of equity against the anomalous charge of being in certain cases contrary to justice, or of being, in any case, incompetent or powerless when justice—that measure of natural justice properly within the contemplation of civil authority—having no sufficient remedy at law, requires her interference.

The consequences of the prevailing doctrine are not a little alarming, and; it will readily be admitted that they cannot be easily reconciled either with public policy or the general principles of equity. It is scarcely credible that in a great empire, aged, and civilized as Great Britain, whose national character and greatness are essentially commercial—especially in Ireland, where it is of such vital importance to protect and encourage trade—a trader may be ruined,—his attention distracted from his lawful business, and his capital swamped in the unavoidable costs of his defence in a suit contrived perhaps by malignant guile for the mere purpose of vexation or revenge—

in the *High Court of Chancery*;—that the deep malice or artful villainy by which he is assailed may consummate its purpose with impunity under the very eye and cognizance of the *Superior Court of Equity in the kingdom*, and not only he, but his family and creditors are to be involved in the same ruin, if either the suit abates by his death before decree, or, even after a decree by which the Court may have with indignant reprobation dismissed the cause with costs—if an abatement happens by the death of either party before those costs are taxed! If such is the fact, it may well be the subject of wonder and regret, and loudly call for legislative interference; but it is to be hoped that the fact is not so.

It is not intended, and indeed could not rationally be intended, to discuss in a *note* a subject so very large as the Chancery jurisdiction respecting costs, involving as it does the consideration of the whole nature and extent of the jurisdiction of the Court. But it may not be improper in this place to offer for the student's consideration a few remarks upon some of the leading questions, and especially as to the rule that there cannot be a revivor for *untaxed costs*.

The jurisdiction as to costs in equity, considered as it rests upon the authority of decided cases, it must be owned, is in a very embarrassing and entangled state. Mr. Beames in his treatise upon the subject, has deemed it necessary to entitle his introductory chapter, in which he endeavours to lay down some general principles, as "Containing a few *conjectures* as to the *principles* on which Courts of "Equity act with respect to costs." That the subject should be in such a state, is much to be deplored, especially when it is considered that the costs of a suit are frequently ten times as great as the value of the matter in litigation; and that in the present state of the authorities it is in most cases utterly impossible for an advising Counsel to give any thing like a confident opinion as to whether in the event of a suit his client shall receive or pay the costs of it. A very brief examination of the cases is sufficient to shew that the confusion has arisen not from any want of applicable principles of equity, nor any difficulty of applying them, but from the uncertain and contradictory notions which have prevailed respecting the nature of the jurisdiction exercised by the Court.

There can be no doubt that the jurisdiction of the Law Courts respecting costs is strictly statutable. The common law made no provision for the costs of litigation; and when it is considered that the system contemplated a primitive, or comparatively simple, state of society, the propriety of the omission at once appears. But it is particularly worthy of remark, that although the common law made no provision for costs, it afforded ample security against the bringing of unjust actions or the resistance of just demands: for the party so guilty was amerced by fine to the King, and such fines formed a branch of the royal revenue; and in cases of malice, there was, and still is, a special action for the aggrieved party. No doubt, in actions for damages—i. e. properly, personal actions (for although damages might be obtained in both personal and mixed actions, it was in respect of the personalty exclusively)—as may have been expected *a priori*, the jury soon adopted the practice, when finding for the plaintiff and ascertaining the damage, of taking into their consideration the expenses of the suit; and so it became usual to lay in the declaration the damage—i. e., the amount of the loss or injury which was the cause of action and which exclusively was the damage in point of law—at a sum sufficient to cover that which was properly the damage, and the expenses of the suit. The reason, as every student is aware, of this usage in pleading was, that the jury could not give damages beyond the sum laid; which sum should necessarily purport to be the amount of the loss or injury which was the cause of action. It is, therefore, inaccurate to say that costs are in the nature of damages; as it is plain that their being given under the colour of damage was a fraud upon the law. This consideration seems very important when examining the question, how far the maxim "*actio personalis moritur cum persona*" is properly applicable to rights and liabilities in respect of costs in Chancery; though, certainly it does not reduce the difficulty—which

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of relieving the parties oppressed by this irregular litigation, and of ordering to them the costs which they have been vexatiously put to. It is needless to say that the Court has such jurisdiction and that the exercise of it is of the very commonest occurrence upon demurrer, or upon application under the 93rd rule, in such cases. Again, it follows from the same principles, that if, when the case is brought to a hearing, it appears either that the plaintiff's case is fraudulent, or that he is unable to substantiate it, the Court must have the power of dismissing the bill with costs, *and of enforcing the costs after the bill has been dismissed*, just as under the 93rd rule. Almost every day we see the exercise of such jurisdiction without ever dreaming that it involves the least difficulty of principle: nor, in truth, does it; although, the principle itself, perhaps, has not been sufficiently considered. It is obvious that the jurisdiction as to costs—or, in other words—that inherent authority of the Court by which and by which only, the punitory and remunerative principles of the law are administered in Equity,—is totally independent of the primary jurisdiction which, as we have seen, is conditional, and liable to be extinguished by the death of a party. The primary jurisdiction relates exclusively to the subject matter of the cause, and regards the litigants only in their relation to that subject matter: it is (at least down to a certain stage) determinable by the will of the plaintiff; and before its purpose is satisfied, may be divested by events not under the control either of him or of the Court. The secondary jurisdiction, on the other hand, relates not to the subject matter of the suit, but to the propriety of the proceedings in it—*i. e.* the practice of the Court; it is absolute in the Court, and is not subject to the will of the suitors but is compulsory upon them; it exists *before* the institution of the suit, and lays down the rules by which, under pain of certain penalties, the proceedings in it are to be conducted. As the one jurisdiction regards the parties in the cause collectively in relation to the subject matter of it, and administers what may be termed the primary equity; the other regards the suitors not collectively but *individually*—not in relation to the subject matter of the cause but in relation to the proceedings taken by them respectively, and administers what may be termed the secondary equities arising in respect of the proceedings. It is then clear in principle, that although the primary jurisdiction must from its nature be suspended or extinguished by abatement of the cause, the secondary jurisdiction is unaffected by such abatement: for *it has no proper relation to a cause*—it relates to individuals who have acquired certain equitable rights, or incurred certain equitable liabilities, by their respective proceedings in the Court and under colour of its authority. Hence it necessarily follows, that this secondary jurisdiction must continue until its purpose is executed; or, in other words—until the secondary equities, which have arisen in respect of the proceedings in the Court, are perfectly satisfied.

The general doctrine, that there must be a bill or cause to originate the jurisdiction, is no doubt true; for, the primary jurisdiction, as has been seen, cannot exist at all without a cause; and although the secondary jurisdiction is the inherent authority of the Court which exists always, still it is operative only in respect of the proceedings in the Court, which must necessarily be commenced by petition or bill. But from this doctrine as to the bill, it was inferred by the old jurists that there could be no jurisdiction where there was not an existing cause; and, undoubtedly, whoever will not acknowledge the twofold nature of the jurisdiction must admit that the inference is just. It was, however, productive of such violence to equitable principle, and of such gross injustice, that in course of time it became indispensably necessary to the honor of the Court to make what were termed *exceptions* to the general rule; which, in truth, were not properly exceptions to the rule in question, but examples of another general rule, the nature of which was unknown. Two cases of this kind have been already hinted at:—First, the demurrer for want of parties, which the Court allows with costs, although there is properly no cause in Court: for the death of the omitted parties should abate the cause. Second, the order or subpoena for costs after dismissal of the

bill—a practice which seems to have been introduced by Lord Hardwicke; and although, for the reasons already stated, it is not only consistent with, but required by, equitable principle, and although the benefit of it certainly is great, it must be admitted that this eminent Judge applied rather a strong hand to the knot which should have been carefully untwisted. His assertion *as to the bill being dismissed for other purposes but in Court for this*, could not be justified; yet it was so near akin to the oath of ‘My Uncle Toby’ it might have been hoped that equity would pardon it. Whether it was pardoned will presently appear. Unfortunately, the oath—the nonsense—has been too often repeated since, without the generous principle of which it was in his case only the irregular ebullition. But—thirdly, comes the jurisdiction which the Court has exercised, and does exercise, in *abated suits*—the order that the cause shall be revived within a given time, or that the bill shall stand dismissed; and as to this, it will be proper to consider the decisions a little more at large.

It can scarcely be necessary to observe that, if the doctrine which has been briefly sketched in the foregoing paragraphs be correct, it should follow that in no case can the practice of reviving a cause for costs have any colour of principle or reason—that the secondary jurisdiction cannot be affected by abatement of the cause; and that it should make no difference in what manner, or at what stage of the cause, the abatement happened. At least, it must be admitted, that a different doctrine has led to consequences which seriously hinder the administration of justice, and are not less objectionable upon technical grounds. The unfortunate expression of Lord Hardwicke, which has been already adverted to, and which taken literally is utterly inconsistent with correct principle, was (strange to say) even in his own time adopted in the letter and not in the spirit of it; and was at first supposed to sustain in its full extent the monstrous doctrine that after a bill has been dismissed generally with costs, it is still in Court; and consequently, that if in such a case there were twenty defendants, nineteen of whom had taxed their costs and been paid, but before the twentieth had his costs taxed any of the others should happen to die, it would be necessary to revive the original cause which had been dismissed, and to bring all the proper parties to it again before the Court! This was an absurdity too gross and too oppressive to be tolerated; and it may be asked—how would either the oppression or absurdity be reduced by supposing the taxation to have been complete before the death happened? Lord Hardwicke was obviously most anxious to relieve the suitors, and to do what equitable principle plainly required to be done; but he could not assert the contradiction in terms, that the subject matter of the original cause was in Court after it was dismissed—or, in other words, that there could be a revivor where there was in fact no cause; and he was, though deeply disgusted, forced to gulp down the absurdity—the bitter dregs in the cup of retributive justice,—and to declare that as in such a case there could not be a revivor, *the costs were therefore lost* unless they had been taxed before the *imaginary* abatement of the *imaginary* cause! As a necessary consequence of the foregoing, arose the doctrine, that after decree there cannot be a revivor for untaxed costs *unless some portion of the subject matter of the cause remains to be executed under the decree*—or as it is expressed in some of the cases—*unless the decree is executory*. Now it may be observed in passing, that with whatever propriety the term ‘executory’ may be applied to a decree to account or conditional decree, it is totally inapplicable to a final decree, which, whether dismissing the bill generally with costs, or giving the relief prayed by it, is the final judicial act, upon which, the primary jurisdiction becomes a satisfied trust, and with the cause ceases to exist; all that remains to be done being within the province of the secondary jurisdiction, and purely ministerial—to give effect to the several individual rights ascertained and *separated* by the decree. For this reason it is, that a final decree cannot be amended as to the subject matter of the cause, except by a bill of review; and for the same reason, it should follow that although, for the purpose of effectuating the individual rights ascertained

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by the final decree, a supplemental suit may sometimes be necessary, a revivor of the original cause never can be either necessary or possible consistently with the principles of equity. But without at present dwelling upon a point collateral, let us examine Lord Hardwicke's doctrine—or rather the doctrine which, sorely against his will, was forced upon him—that after decree, there cannot be a revivor for untaxed costs except where (as the phrase is) the decree is executory. This is the old garment mended with new cloth. The new part of it when analyzed may be thus cast into the form of a syllogism:—There cannot be a revivor except in respect of some part of the right in the cause: *but the right of costs is no part of the right in the cause: ergo*, there cannot be a revivor for costs. So far the proposition is indisputably true. But while the necessities of the case thus forced the distinction between the primary and secondary equities, and the implied admission that the right of costs is no part of the right in the cause, the want of the notion of secondary jurisdiction rendered this implied admission unintelligible—or at least, inconsistent with the prevailing doctrine as to the jurisdiction, and the practice of the subpoena after dismissal of the bill,—and still bound the great mind of Lord Hardwicke to the double absurdity of admitting in the same breath that the right of costs *may not be revived, yet may be revived,—and that a right which is essentially one is at once dependent and independent of the same thing, viz., the cause.* Here then, is the genuine principle of justice choked with absurdity, and the regret of science embittered by the recollection that a citizen is wronged.

But independently of all this doctrine of abatement and revivor, a difficulty is said to arise where either the person who should pay the costs or the person entitled to receive them happens to die before taxation; because 'costs cannot be considered as a vested debt until they are taxed;' and, therefore, neither the right nor liability in respect of them can, before taxation, be transmissible to a personal representative. There might be some force in this argument as applicable to this particular case, if the premises were true. But with what truth can it be said that costs decreed are not properly to be considered as a vested debt before taxation? The Court very properly refuses to issue its subpoena for costs until they have been taxed; for otherwise, the writ might be overmarked, and made the instrument of fraud and oppression. But what is it that the taxation does? Does it give a new right, or alter a right already existing?—no: 'the right of costs,' Lord Hardwicke says, 'is the same before taxation as after.' Does it render items in the bill lawful which were previously unlawful?—no. Does it make items not in the bill?—no. Does it create anything, or give a new legal character or efficacy to any thing?—no: it merely ascertains the proper amount of the pre-existing lawful demand; and with as much shew of reason could it be said that the right or liability in respect of a tradesman's bill is not transmissible to the personal representative of the creditor or the debtor, if either happened to die before an account stated, or before certain objectionable items were struck off, as that the right or liability in respect of costs decreed is not transmissible if either the party to pay or to receive them happens to die before taxation.

But it is now time to turn to the cases of abatement before the final decree. Here, although each party in the cause may have become indebted to his solicitor to the amount of several thousand pounds for costs, they cannot have been taxed at the time of the abatement, and the absurd notion of a party reviving his adversary's suit has never been suggested before decree. It is needless to advert to the variety of cases: one of them will be sufficient for the purpose of illustration. According to the English decisions, if the plaintiff being a *femme sole* marries pending the cause, the suit abates, and unless revived, the defendant's costs are lost. Thus, for example, if a woman of abandoned character shall, for the purpose of fraud or intimidation, file a bill and thereby rake up the sins and follies of youth against the respectable head of a large family—making his wife, his children, and the trustees of his marriage settlement with several others parties to the bill; and afterwards the cause progresses; the answers

of the wife and daughters are enforced; and issue having been joined, it becomes indispensibly necessary to the character of the principal defendant to seek, perhaps in the most distant corners of the empire, proofs of the falsehood of the main allegations in the bill and of the iniquitous fraud in the transaction by which it is now sought to deprive his wife of her jointure, and his children of their means of support; and when, at last, after enormous cost, the defendant's proofs are made, and the cause being ready for hearing, the plaintiff (who, by this time, perhaps, may be the mistress of a gainful hotel) is advised, that her bill will inevitably be dismissed with costs,—all she has to do, in order to extinguish the cause, and get rid of all liability in respect of it, is to go through the farce of a marriage with any wretch base enough to marry her! Why is this? The cause is abated and the jurisdiction of the Court as to the subject matter of it is extinguished. But the husband and wife, who now represent the late plaintiff, are entitled to revive the cause, and perhaps they may think proper to hold their intention of doing so, *in terrorem*, indefinitely over the heads of the defendant and his family. Could such a thing be tolerated? No, that would be too monstrous a violation of equitable principle; and so, the rule is, that if the cause abates by the death, marriage, or bankruptcy of the plaintiff, whereby the jurisdiction as to the subject matter of the cause is extinguished, the Court will, upon the application of any of the defendants, order, “that the suit be revived within a limited time, or that the bill “shall be dismissed *as to such defendant*.” But why not dismissed with costs? Are not all the general orders of the Court decrees of Equity binding upon the suitors and their representatives? Are they not *conditional decrees for costs* against every suitor who comes into the Court, and do they not become absolute decrees upon the happening of the event by which they are conditioned? Are they not guaranties; and are not the faith and honour of the Court bound by them, and by obvious principles of equity, when in such a case it orders the dismissal of the bill, to order also that it be dismissed with costs? To all this, the Courts answer, “The cause is abated, and there is no jurisdiction.” Whence, of what kind, or how obtained, was the jurisdiction to order the bill to be dismissed, after the jurisdiction as to the cause was at an end—or, why such jurisdiction, of whatever kind, is so limited as to be unfit for Equity—is not stated.

The reader can scarcely have failed to perceive, that in this class of cases, just as in that which has been already observed upon, the operation of equitable principle has necessarily been to force the distinction, between what the Reporter has ventured to denominate the primary and secondary jurisdictions, and likewise the primary and secondary equities: for here it appears, that although the primary jurisdiction, and its object (*i. e.* the bill as the representative of a cause), are out of Court by the abatement, there still remains in the Court a certain other jurisdiction, whereby it can make an order, which is, properly speaking, *not an order in a cause*—an abated cause being a nonentity—but an order of its inherent authority respecting *the proceedings*, which, although no longer representing a cause, still remain in Court in their secondary character and the proper subjects of secondary jurisdiction. The technical objection to this class of decisions, is, that while the secondary jurisdiction recognises a present *right* in respect of the proceedings in the Court—viz., a right to revive, *i. e.* to *retain and prosecute* them against the defendants—it does not recognise any present *liability* in the person having the right; and therefore it recognises a civil right of *A.* against *B.*, without a consideration: *quod absurdum est*. The *absurdum* may also be exhibited as a direct contradiction in terms, by having regard to the nature of the right of revivor; but it is needless to ring all the changes of a false proposition.

In this state of the English authorities, it is certainly with not a little pride that the Reporter is able to refer to the decisions in *Kiernan v. Kiernan* (4 Law Rec. N.S.) by Sir Wm. M'Mahon, and in *Grace v. Reid* (Cr. & Dix, and S. C. 6 Law Rec. N.S.) by his Honor the present Master of the Rolls; which, as it is humbly conceived, are decisions that square exactly with the demands of principle; and what is better still, they

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are decisions by which full justice has been done. There is, however, in the printed report of the former case, an obscure suggestion respecting a difficulty as to the person against whom the subpoena should issue; but this must be a misprint: for, it must be owned, the principle which justifies the decision, should regard as an absurdity any doubt as to the person against whom the subpoena should issue. Does not the fact which abates the primary jurisdiction (*viz.*, the marriage of the female plaintiff), give to the husband a vested right in the proceedings had by his wife before her marriage? and how can he have this right without the attendant liability? Is it not too late to question the liability after the right has been declared? And is not the order for dismissal of the bill as *positive* an act of the Court's authority against the person who would otherwise be entitled to retain it, as if costs had been superadded? The principle as to the personal representative is just the same, the only difference in effect being, that the marital liability is unlimited and absolute, and that the representative liability is only to the extent of assets. In *Grace v. Reid*, the abatement was by the death of one of the defendants; and, for that reason, one or two preliminary remarks are necessary in order to exhibit the full principle and effect of the decision.

It has been already shewn, that from the nature of the primary jurisdiction—or, in other words—that, from the necessities of equitable principle, a cause in the contemplation of Equity must either exist entirely, or not at all; and that the doctrine of *partial abatements* (which the Courts have sometimes winked at for the purpose of preventing intolerable violations of justice and moral feeling), if doctrine it can be called, is in the view of equitable principle a mere contradiction in terms: for a cause is an entire and indivisible thing. Therefore, whether the abatement be by the death or marriage of the plaintiff, or by the death or marriage of one of the defendants, is utterly immaterial—it is an abatement which extinguishes the cause; and although, in practice, it is very common, where a necessary but perhaps formal party has dropped out of the cause, to proceed with it and obtain a decree without apprising the Court of the abatement, such practice is fraught with danger to the persons who may afterwards have occasion to make title under the decree. To these observations it is proper to add, that, in the case of *Grace v. Reid*, the Master of the Rolls was pleased to order that the cause should be revived within a limited time, or that the bill should stand dismissed with costs. If the principle of that decision is to be admitted, it should rule all the cases which have been adverted to; and there can be no doubt that it would have the effect of sweeping out much of the rubbish with which Chancery practice is at present entangled, and of reducing it to something like a simple and scientific system.]

CROFTS v. LORD EGMONT.

1840.

Rolls.

Nov. 12.

THE bill in this cause prayed, amongst other things, for an injunction to restrain proceedings at Law; and the usual injunction was granted in the first instance on the 10th of February last. The defendant answered upon the 8th of July following; and upon the 13th of the same month, the plaintiff gave notice of moving to continue the injunction to the hearing of the cause, on equity confessed in the answer, but did not state by his notice that such motion should be without prejudice to his right of excepting to the answer for insufficiency. However, on the 9th of September, he gave notice of exceptions; and on the 20th of October (the three weeks limited by the rule* having then expired), issued a summons for the first time, to the defendant's solicitor, to attend to argue the exceptions. The defendant's solicitor attended, and begged time until his Counsel should come to town; in consequence of which the consideration of the exceptions was deferred, and nothing had as yet been done upon them. The notice of the 13th of July, to continue the injunction, was not moveable until the first day of the present Sittings; and, on the motion, nothing was said of the exceptions, and the injunction was continued upon terms.

In an injunction cause, upon the coming in of the defendant's answer, the plaintiff gave notice of motion to continue the injunction upon equity confessed, but did not state that such motion should be without prejudice to the right of excepting to the answer for insufficiency: *Held*, that exceptions afterwards filed were irregular: the notice of motion to continue the injunction should have been 'without prejudice,' &c.

Mr. *Collins*, Q. C., with whom was Mr. *D. R. Kane*, for Lord Egmont, now moved that the exceptions should be taken off the file for irregularity; and contended, that the plaintiff's notice of motion to continue the injunction upon equity confessed in the answer, without any saving of the right to except, was a waiver of all objections to the answer for insufficiency. They further insisted, that the plaintiff's proceedings with reference to the exceptions had been altogether irregular: he gave notice of a motion, after which, according to the rules of the Court, he could not except at all; but even if it had been competent to him to except after the notice of the 13th of July, yet he neither gave notice of the exceptions within the time limited by the rules of the Court, nor proceeded to obtain a report upon the exceptions within the regular time after notice of them was given. It was also stated that Lord Egmont was at present upon the Continent, and that the subject matter of the exceptions related to transactions alleged to have taken place between his agent and the plaintiff, as to which it was highly improbable that the defendant could give any information. *Allen v. Murphy* (a); *How. Eq. Exch.* 457; *Wyatt's Pr. Reg.* 202.

Mr. *Osway*, for the plaintiff.—The defendant's answer came in at the

(a) 3 Law Rec. O. S. 326.

* 75th General Order, Nov. 1834.

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commencement of the long vacation, and just as Counsel were about to leave town on circuit. A notice of motion to continue the injunction upon equity confessed was then served as of course to prevent the injunction from falling, and as soon as it was possible to obtain Counsel's opinion upon the answer, notice of the exceptions was given. It was then in the very depth of the long vacation, when the Counsel both of Lord Egmont and the plaintiff were out of town, and it is plain that the delay with which the plaintiff is charged was altogether unavoidable, and that at any rate it is not now competent for the defendant to rely on that ground of objection, as his solicitor attended before the Master on the summons of the 20th of October, and obtained time to prepare to argue the exceptions. Therefore the single question on this motion is, whether the notice of motion to continue the injunction upon equity confessed without saving the right to except, is necessarily a waiver of that right? There can be no doubt that you may move to continue an injunction upon equity confessed 'saving the right to except,' and it is submitted that an express reservation of the right is unnecessary, as the admissions may be sufficient to ground the motion, although the answer may be short in material particulars and altogether insufficient as an answer to the bill, or for the purposes of the cause. *Harcourt v. Ramsbottom (a)*; *Lambert v. Lambert (b)*.

The MASTER OF THE ROLLS, after stating the facts appearing upon this motion, now said—

The bill in this cause, and the defendant's answer to it, have been so recently before the Court on the motion to continue the injunction, and the material facts of the case were then so much commented upon, that I cannot throw entirely out of my consideration the fact which appeared on that occasion—that it is at least improbable that the defendant could give any further information than he has already given in answer to the plaintiff's bill. I may also observe, that I continued the injunction upon terms; and I have little doubt, that even if the application had been without prejudice to the right of excepting, and I had been asked to put the plaintiff under the further terms of not excepting, I would have imposed such further terms—especially, as the defendant's absence upon the Continent should necessarily render the taking of exceptions the cause of much inconvenience and delay. The case of *Allen v. Murphy* shews that the continuance of an injunction without prejudice to exceptions, is by no means of course: it must, clearly appear that a further answer from the defendant is necessary, and that the exceptions have not been taken for the purpose of delay. But independently of such considerations, I have no doubt that I must grant the present application, upon the ground that the motion to

(a) 3 Swst. 362.

(b) 1 Ir. Eq. R. 9.

continue the injunction upon the equity confessed by the answer, without any saving of the right to accept, was a waiver of all objections to the answer for insufficiency.

In *Costigan v. Hinchey* (a), it was held that the plaintiff must decide within the period limited by the rules of the Court whether he will move to continue the injunction, or except to the answer; and that, if he excepts, he cannot move to continue the injunction upon equity confessed by the answer, but may move for a new injunction without prejudice to the exceptions. That decision shews, that, in the opinion of the late Master of the Rolls, a plaintiff cannot first move upon equity confessed, and afterwards as of course except to the answer. I am of the same opinion; although I am not prepared to go the length of holding that a plaintiff may not except to the answer and still move on its admissions, expressly reserving the question as to the exceptions pending, or saving the right to except. In *Howard's Equity Exchequer* (b), it is said that "if the plaintiff should move for an injunction upon equity confessed in the defendant's answer, he cannot afterwards except for insufficiency; for upon his own motion he hath admitted an answer which must be supposed to be a full answer, as a short answer is not deemed an answer: *sed quære*. But the proper method is, first to except, and then give notice of a motion for an injunction on equity confessed *without prejudice to the exception*." By the the rule of 18th March 1819 (c), a plaintiff may serve his notice to continue the injunction, founded upon equity in the answer, without prejudice to excepting. I am therefore of opinion that according to the practice of this Court, you may move to continue the injunction upon admissions in the answer without prejudice to exceptions, or the right of excepting; but in such case, the exceptions or the right of excepting, must be expressly saved by the notice. The Court may continue the injunction without prejudice to exceptions, as desired; but *Allen v. Murphy* shews that it is not by any means of course to do so: it must clearly appear to the Court that the answer, although containing admissions sufficient to ground the motion, is materially defective and insufficient for the purposes of the cause. Otherwise, the Court, when continuing the injunction, will put the plaintiff under terms of waiving the exceptions; and it necessarily follows that an injunction upon equity confessed without any saving of exceptions, extinguishes them as of course.

As to the case of *Lambert v. Lambert* (d), I find upon reference to the Registrar's book, that the notice of motion there was 'without prejudice to the exceptions then filed;' it is, therefore, not an authority against the present application, which I must grant; but I will say—no costs of this motion.

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(a) 1 Hog. 46.

(c) Smith's Rules, 164.

(b) p. 457.

(d) 1 Ir. Eq. R. 9.

1840.

*Rolls.*CRAMER *v.* GRIFFITH.*Dec. 4.*

The Court, upon a motion on behalf of a landlord, for liberty to proceed at law, notwithstanding the appointment of a receiver, will not enter into any question of equities between the landlord and tenant, but will, in a proper case, refer it to the Master, to inquire and report whether any proceedings should be taken in defending the ejectment, or in relation thereto.

ARABELLA FOX, being seized in fee of the lands of Bawn, in the county of Longford, executed a lease, bearing date the 10th of June 1801, whereby she demised the said lands to John Ousley, for three lives, two of which were still in being, at the yearly rent of £479. 12s. 0d., late currency. After the execution of this lease, John Ousley was appointed the land agent of Arabella Fox, and so continued down to the year 1831, when William Walker was appointed her agent. Arabella Fox died in 1834, having previously executed some settlement, under the limitation of which, Stratford Kirwan and Richard Fox became entitled to the lessor's interest in the lands. It appeared, that in the year 1831, in consideration of the general fall in the value of land, and of valuable and lasting improvements made upon the demised premises by John Ousley, Arabella Fox agreed to make a reduction in the rent from £479. 12s. 0d. to £320, late currency; and the fact of this reduction was evidenced by a series of rentals or stated and settled accounts, signed by Arabella Fox, and passed between her and John Ousley, as principal and agent; and she continued to receive the abated rent from the year 1821, not only to the time of John Ousley ceasing to be her agent, but down to her decease in 1834. John Ousley died in 1835; and by order of 12th July 1839, a receiver was appointed in this cause over the tenants' interest. Stratford Kirwan and Richard Fox, after the decease of Arabella Fox, continued to receive the abated rent from John Ousley, and, after his death, from his representatives, and the receiver in this cause; and in Easter Term 1838, an arrear of two years' rent having then accrued due, William Walker, as the land agent of Stratford Kirwan and Richard Fox, on that occasion made an affidavit, ascertaining the amount of the rent then due to be £591. 4s. 3d. sterling, being the amount of two years' rent of the said lands, at the abated rent. This arrear was subsequently paid by the receiver in the cause; but on the 4th of February 1840, Stratford Kirwan and Richard Fox caused a notice of that date to be served upon him, stating, that from the 1st of May 1839, the original rent of £479. 12s. late currency would be enforced. The amount of the abated rent was subsequently tendered to Stratford Kirwan and Richard Fox by the receiver, to November 1840, but refused to be received by them. Upon this state of facts, and there being a year and a-half's rent due of the said lands up to the 1st November 1840,—

Mr. *Litton*, Q. C., moved the Court, on behalf of the said Stratford Kirwan and Richard Fox, for liberty, notwithstanding the appointment of a receiver in this cause, to proceed at law, as they might be advised, for the sum of £664. 1s. 3d., sterling, equivalent to the sum of £719. 8s., late currency, being the amount of one and a-half year's rent of the said lands,—suggesting that the abatement was only made during pleasure, and that there was nothing in the case to preclude the lessors from enforcing the full amount of the original rent.

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Mr. *Jenkins* for the receiver, submitted, that under the circumstances of the case, the Court would either pronounce no rule on the motion, or if disposed to grant it, refer it to the Master to inquire and report whether any, and what, proceedings should be taken by the receiver, for the purpose of defending the ejectment, or in relation thereto. That the abated rent had been received for nearly twenty years, both by Arabella Fox the lessor, and those deriving under her, and that the agreement for the reduction of the rent was evidenced by the stated and settled accounts, signed by Arabella Fox, and by the affidavit of Mr. Walker the land agent of Stratford Kirwan, and Richard Fox;—that this dealing and these documents amounted in Equity to evidence of a release of the sum of £159. 12s. 0d. late currency, the difference between the original rent of £479. 12s. 0d., and the abated rent of £320, and that this view of the case was substantially borne out by a consideration of the cases of *Aston v. Pye* (a); *Eden v. Smyth* (b); *Flower v. Martin* (c); *Wicket v. Raiby* (d); *Norton v. Ward* (e); *Sibthorp v. Mozom* (f); *Gilbert v. Wetherall* (g); in which it was decided that entries in books, letters, parol declarations, and the general dealings of parties were tantamount to a release, and that the Court would not permit a party claiming under the person bound by the equitable release, to set up or revive a claim which it was clear the original person had abandoned. That in the present case, the affidavit of the land agent of Stratford Kirwan and Richard Fox, with the subsequent receipt by them of the abated rent, evidenced a confirmation by them, if any was necessary, of the agreement for a reduction of the original rent, by Arabella Fox;—that this was an application to the discretion of the Court, and if the Court was satisfied that the receiver had an equitable defence to the ejectment, it would not permit an ejectment to be brought for non-payment of the rent of these lands, calculating the same after the rate

(a) 5 Ves. 350.

(c) Myl. & Cr. 459.

(e) R. & Myl. 178.

(b) 5 Ves. 341.

(d) 2 B. C. C. 386.

(f) 3 Atk. 580.

(g) 2 Sim. & Stu. 254.

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mentioned in the original lease, when the receiver was willing at once to pay the amount of the rent due, according to the abated rate.

MASTER OF THE ROLLS.

I must grant the application of the lessors for liberty to proceed at law, as it is not the practice of the Court to interfere with any rights a lessor supposes he is entitled to, nor to try the merits of such cases upon motion. But on the facts stated, I think it a very proper case for a reference, and shall therefore refer it to the Master to report whether it will be for the benefit of the parties in this cause that any and what proceedings should be taken by the receiver to defend the ejectment, or in relation thereto.

Mr. *Litton* applied for the costs of the motion.

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How can I give costs in such a case, and after a tender of the abated rent? Upon the facts stated, your client may have to pay the costs of a suit in Equity.*

* But see *Fitzgerald v. Lord Portarlington*, 1 Jones, 430.

JOHN FAWCETT, *Plaintiff.*
THOMAS HODGES, public officer of the Agricultural
and Commercial Bank of Ireland, JAMES CHAM-
BERS, JOHN DWYER, PHILIP JONES,
CHARLES MALLEY, JOSEPH ROBINSON
PIM, GUSTAVUS WILSON, and HENRY
WATSON, *Defendants.*

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Jan. 14.

Held, upon demurrer, that the Banker's Act, 33 G. 2, c. 14, is not repealed by the 6 G. 4, c. 42; and that upon the stoppage of payment by a Joint Stock Banking Company formed under the latter statute, a trust is created—in favour of the creditors, and affecting all the property of the shareholders—under the Banker's Act, which may be administered by this Court, at the suit of any creditor against the Public Officer of the Company, instituted without making the other creditors or the shareholders parties;—it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities of the Company, and it not appearing that the shareholders have any other liabilities than those of their co-partnership.

THE bill in this cause was filed against the defendant Thomas Hodges, as public officer of the Agricultural and Commercial Bank of Ireland,

and the other defendants as Directors and Managers, by the plaintiff on behalf of himself "and the several other creditors of the society "who shall come in and contribute to the expenses of this suit." It stated*—

That in and previous to the year 1838, a certain society or co-partnership of Bankers in Ireland, consisting of upwards of 3000 persons, members and co-partners, was framed and established in Ireland pursuant to the provisions of 6 G. 4, entitled "An act for the better regulation of co-partnerships of certain Bankers in Ireland," called the Agricultural and Commercial Bank of Ireland, which society or co-partnership was so framed for the purpose of carrying on—and plaintiff charged did carry on—in the said year 1838, and for several years previous thereto, and from thence until the stoppage of payment of such bankers as after mentioned, the trade and business of bankers in Ireland, at various towns and places in Ireland and more particularly at [the several towns in the counties of Tipperary, Galway, Sligo, and Waterford, in which branch banks were established,] by issuing bills and notes of the said society or co-partnership, and by receiving of deposits in cash and Bank of Ireland notes, and by discounting bills of exchange and promissory notes according to the usage and custom of bankers in Ireland, as by a return or account entered at the Stamp Office in Dublin, in pursuance of said act, and verified by the solemn declaration of one William Hughes, as one of the officers of the said society or co-partnership, bearing date, &c. &c., and by a copy thereof attested by the Comptroller General of Stamps in Ireland might appear.

That the business of the said society or co-partnership was managed under the directions, advice, and control of certain members of the said co-partnership, called Directors; and that pursuant to the provisions of a certain deed of agreement for regulating the business and affairs of the said co-partnership, which deed was alleged to be in the possession of the defendants after named, or some of them, and the particulars of which the plaintiff was unable to set forth, certain members of the said co-partnership, that is to say, John Chambers, John Dwyer, Philip Jones, Charles Malley, Joseph Robinson Pim, Gustavus Wilson, and Henry Watson, were chosen and nominated by such society or co-partnership as Directors to manage and direct, and to act as a consulting committee in managing and directing the business of the said society or co-partnership of bankers: that the said several above-named persons were, from the 1st day of January 1840 to the 20th day of June 1840, the Directors of the said society, &c., and in the said month of June 1840, acted as such Directors and as members of the consulting committee or board of management and direction of such society, and still professed to act as Directors of the said co-partnership.

* It has been deemed advisable to give the statement and prayer of the bill at length.

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That the said co-partnership, &c., and its Managers and Directors, in order to induce plaintiff and the public in general to give credit to the said co-partnership, and to induce them to take the bills and promissory notes of the said co-partnership, and to make deposits of cash and Bank of Ireland notes in the several banking concerns of the said co-partnership, &c., from time to time made and published various false and fraudulent representations of the property or alleged property and state of the affairs of the said co-partnership, &c., and caused to be printed and published in a certain book called *The Dublin Almanack and General Register of Ireland for the year 1840*, which was in said year published in Dublin by Pettigruae and Oulton, &c., a certain statement, announcement, or advertisement, headed or entitled '*The Agricultural and Commercial Bank of Ireland*,' in which it was amongst other things stated as follows:—"Corresponding and Consulting Committee elected annually from amongst the largest class of shareholders on the first Monday in the month of November, meet daily at the Company's house, 63 Fleet-street. The shareholders at present registered exceed 3000 in number, embracing the landed and commercial classes. Capital, one million, with power in the deed of settlement to extend it to four millions with consent of a special meeting of proprietors;"—as would more fully appear by the said statement in page 187 of the said book to which plaintiff referred.

That in said statement or notice so published, &c., the names of the persons stated to have been Directors of the said society or co-partnership, including the names of the persons hereinbefore stated were given; and amongst the names therein inserted as being Directors of said co-partnership, &c., appeared those of '*William Hodges, Esq., Alderman, Miltown House*,' and '*Arthur L. Saunders, Stephen's Green and Killarney*,' although, as plaintiff charged, the said Wm. Hodges and Arthur L. Saunders had then ceased to be members of said co-partnership; and as evidence thereof plaintiff charged that their names did not appear in the said return so lodged in the Stamp Office, although plaintiff charged that the said William Hodges and Arthur L. Saunders were in the year 1838 members of such society or co-partnership.

That on or about the 20th day of April 1840, a meeting of the members of the said society or co-partnership was held at the said house of the said co-partnership, &c., at 63 Fleet-street, in the city of Dublin, at which meeting Henry Watson, a member of said society, &c., and one of the said Directors thereof, took the chair, and thereupon a report in writing, purporting to be a report of the Board of Directors of the said society, &c., to the proprietors or co-partners of the said society, &c., signed by the said Henry Watson was presented and read; and was then and there ordered to be received and entered on the minutes of such society, &c.; which report bore date on or about the 18th day of April 1840; and stated, amongst other things, that the profit on the business transacted at the branches for the last half

year was more than double that of the preceding half year; as by said report in the possession or power of some of the defendants, &c., might appear. That such statement was and still continued to be untrue. That the Directors of the said society, &c., or some of them, or William Hughes or Thomas Hodges, two of the public officers of said society, &c., or some person or persons in their or some of their behalf, and with their or some of their authority, in the month of April 1840, caused to be published in several of the Dublin newspapers, and particularly in the Dublin Evening Mail and Saunders' News-Letter, or one of them, a document purporting to be a report of the proceedings at such meeting, and which report plaintiff charged to have been prepared and furnished to such newspapers, or some one of them, by the said Directors, or one of them, or by the said public officers, or one of them, or some person authorised for that purpose by or on behalf of the said society, &c., or said Directors or some of them; and which professed report of the proceedings at such meeting was published in several or some or one of the newspapers published in Dublin in the month of April 1840. That the said Directors or some of them, or the said society, &c., or some of its officers, paid, out of the funds of the said society or otherwise, to the proprietor or proprietors of such newspaper or newspapers, or for his or their use, for the publication in such newspaper or newspapers of the said report, or a report of the proceedings at such meeting, or what purported to be a report of the proceedings at such meeting. That in the report of the proceedings at such meeting which was so published in the Dublin newspapers or some or one of them, by and under the sanction and authority and at the expense of the said society, &c., or of some of the said Directors, or of some of them, or of some person or persons by them or some of them authorised, and particularly as published in The Dublin Evening Mail newspaper in the Month of April 1840, it was amongst other things stated as follows: "In addition to the surplus stated of £204,932. 3s. 2d., a sum "of £113,104 is to the credit of the Trustees entitled 'reverted stock;' "which stock has been transferred to said Trustees in lieu of bills and "other debts, to the extent of about £64,000, now to the credit of the "Company." That the said report of the proceedings at such meeting was published with a view to induce plaintiff and the public into a belief of the stability of the said society or co-partnership; and that such statement as to the surplus fund of £204,932. 3s. 2d., and said sum of £113,104 was a false fraudulent and delusive statement, and was put forward by the said society, &c., by the said Directors thereof, in order to deceive plaintiff and the public and to induce them to give credit to the said society, &c.

That confiding in the promises of stability put forward by the said society, &c., and the said Board of Directors, plaintiff, on or

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about the 1st day of June last, deposited and lodged with the said society, &c., at Roscrea aforesaid, and paid into the hands of a certain person named Davis, the Accountant duly appointed, and then and there acting on behalf of the said society or co-partnership of one of the banking establishments of the said society, &c., at Roscrea aforesaid, a sum of £68. 7s. to the credit of plaintiff, the receipt of which sum, plaintiff charged, was then entered in the books or some book of account of the said society, &c., by the said Davis; and thereupon plaintiff required the Manager of such Bank at Roscrea to give to plaintiff a certain letter of credit upon Joseph Harris, Esq., the then Agent in London of such society, &c. for said sum of £68. 7s., in favour of Messrs. Westron and Dignam: Whereupon one Downes, as such Manager, gave to plaintiff a certain letter, signed by him as Manager of said Bank, dated Roscrea, 1st of June 1840, and directed to Joseph Harris, Esq., 14, St. Helen's-place, Bishop's-gate, London; whereby the said Downes, as such Manager, requested the said Joseph Harris to honour the drafts of Messrs. Westron and Dignam, on or after the — day of June, for the sum of £68. 7s. sterling, charging the same to the account of the Agricultural and Commercial Bank of Ireland; as by said letter of credit, ready to be produced, might appear. That on or about the 18th day of June 1840, plaintiff also deposited and lodged with the said society, &c., at its said banking-office, situate at Roscrea aforesaid, and plaintiff then and there paid to the said Davis, then and there acting, &c., a certain further sum of £106. 15s. 9d. sterling, which sum was thereupon also credited, &c., and a letter of credit for the said sum of £106. 15s. 9d., in favour of the firm of M'Birney, Collis, and Co., at Dublin, was then applied for by plaintiff, and drawn by the said Downes, as such Manager, upon the Dublin Agent of the society, &c., and directed to Thomas Hodges, Esq., 63 Fleet-street, who, plaintiff charged, was then the Dublin Agent, and—[Similar statement as of the preceding letter of credit.]

That on or about the 18th day of June 1840, the said society, &c., stopped payment as such Bankers; and as evidence thereof, plaintiff charged that, on said 18th of June 1840, a notice in writing was posted up at the said public office of said Bank, at 63 Fleet-street, in the city of Dublin aforesaid, and where, plaintiff charged, the Board of Directors of the said society, &c., had been and still were in the habit of meeting to transact the business of said society, &c., and where letters of credit issued by the country branches of said society were, up to said last-mentioned day, usually paid, &c.—[a copy of the notice was here inserted]—and which still remained posted up at said public office: That copies of said notice were published as advertisements in several of the Dublin newspapers, and paid for out of the funds of the said society, &c.; and that on the said 18th of June 1840, letters were written and signed by the said Thomas Hodges, as the Agent for and

on behalf of the said society, &c., and by order of the persons then acting in the direction of the affairs of the society, &c., and before-named as Directors, or some of them, and were then forwarded by post or otherwise to the several Managers of the several Branch Banks of the said society, &c., at the several towns in Ireland thereinbefore mentioned, and particularly to the Managers of such Branch Banks situate at Roscrea and at Carrick-on-Suir, Nenagh, Tipperary, and Thurles, by which letters such Managers, or some of them, were directed to stop or suspend payment, &c. That the defendants thereafter named had in their power or possession several of said letters, or a true copy or true copies thereof, written or signed by the said Thomas Hodges, as such Agent, and by such direction of the persons then acting in the direction and management of the said Company and its affairs, at the head office or Company's house, No. 63 Fleet-street, in the city of Dublin, which said letters were written, signed, and forwarded by post to such Managers on or about the 19th or 20th days of June last; and by which the truth of the charges in said bill contained, respecting the stoppage or suspension of payment of such society, &c., would appear, but which the defendant refused to discover. That on or about the said 19th day of June 1840, the said society, &c., stopped payment at their said several Branch Banks, and particularly at the banking office and offices of the said society, &c., at Roscrea, Tipperary, Carrick-on-Suir, Nenagh, and Thurles, and also at Parsonstown in the King's County.

That the said letters of credit thereinbefore mentioned were respectively shewn and presented to the respective persons to whom, and at the respective places where the same were respectively directed, in the month of June last, and after the 18th day of June 1840, by the persons in whose favour the same were so written, or some of the persons belonging to the respective firms, or some person or persons acting on his or their behalf in whose favour the same were written and addressed, and who respectively demanded payment of the sums in said several letters of credit respectively mentioned, according to the usage in such cases; but payment of the said sums was declined and refused by the said persons to whom the same were respectively directed. That the said several letters of credit were afterwards returned to plaintiff by the said Westron and Dignam, and by the said M'Birney, Collis, and Co., respectively, as dishonoured.

That the plaintiff now was the *bond fide* holder of nine promissory notes of the said society, &c., for the sum of one pound each, payable to the bearer thereof respectively on demand; one of which promissory notes bears date, &c.—[Here followed a particular description of the said several promissory notes, shewing their respective number of issue, and the places where they were respectively payable.] That the plaintiff also now held *bond fide* nine other promissory notes for the sum of thirty shillings each, &c.—[The like particular description

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of the several last mentioned notes.]—That upon the said 18th of June 1840, the said society, &c., was and still continued to be justly indebted unto plaintiff in the sum of £175. 2s. 9d. sterling, over and above all just credits and allowances whatsoever, upon foot of the said two letters of credit, and now was indebted to plaintiff on foot of the said promissory notes in the sum of £22. 10s., making altogether the sum of £197. 12s. 9d. with interest thereon; and that plaintiff had made and caused to be made frequent applications to the said society, &c., at the banking offices of the said society, &c., at *Roscrea aforesaid, and also at 63 Fleet-street, in the city of Dublin*, to repay to plaintiff the amount of such deposits so made by him as aforesaid, and also for payment of the said several promissory notes, plaintiff producing, or causing to be produced, as the terms of such demands, and offering on receiving payment of said sums to give up to the said society, &c., the said two several letters of credit which he had so received, and which had been dishonoured as aforesaid; and especially on the 14th of November 1840, plaintiff's solicitor applied to the said Thomas Hodges, the said Dublin Agent of the said society, &c., at No. 63 Fleet-street, in the city of Dublin, for payment of the said sums to him, as the solicitor of the plaintiff duly authorised to sue for payment thereof—plaintiff's said solicitor then and there producing and offering to deliver up to the said society, &c., the said several letters of credit, and the said several promissory notes upon receiving payment of the amount thereof respectively; but the said Thomas Hodges, as such agent as aforesaid, then and there declined to make any payment to plaintiff's said solicitor on account of plaintiff's said demands, and stated to plaintiff's said solicitor to the effect that the said Banking Society, &c., could not at the then present time pay any demands made upon them by the creditors of such society, &c.

That the said society, &c., was at the time of such stoppage of payment, and still continued to be indebted to plaintiff as aforesaid, and also indebted to various persons on foot of the promissory notes of the said society, &c., and deposits made with such society, &c., and on various accounts, in a very large sum of money and exceeding the amount of the sum of £100,000.

That the said society, &c., was also, at the time of such stoppage of payment, possessed of personal estate, credits and effects, consisting, amongst other things, of cash, Bank of Ireland and other bankers' notes, bills of exchange, promissory notes, bonds, debts due by judgment, mortgage and other securities, and also of certain interests in houses wherever the business of such society, &c., was carried on, of a very considerable amount, and sufficient, if realised and rightly administered, to satisfy all the debts of the said society, &c., which were due at the time of such stoppage of payment of the said society, &c.; and all which personal estate, credits and effects whatsoever, either in law or in equity, of which

the said society, &c., was possessed of or entitled unto at the time of the said society, &c., so stopping payment, became and then was, as plaintiff charged, liable and subject to the payment of all and every the debts of the said society, &c., of what nature or kind soever the same might be, and without any regard to priority or preference in point of payment, pursuant to the provisions of an act passed in the thirty-third year of the reign of his late Majesty King George the Second, cap. 14, entitled "An act for repealing an act passed in this kingdom in the eighth year of the reign of King George the First, entitled 'An act for the better securing the payment of bankers' notes and for providing a more effectual remedy for the security and payment of debts due by bankers.'"

That the said Thomas Hodges, the Dublin agent of the said society, &c., was duly nominated by the said society, &c., called the Agricultural and Commercial Bank of Ireland, as one of the public officers of the said Banking Society, &c., to sue and be sued as the nominal plaintiff and defendant for and on behalf of such society, &c., pursuant to the provisions of the said act passed in the sixth year of his late Majesty King George the Fourth, chapter 42, entitled "An act for the better regulation of co-partnerships of certain Bankers in Ireland;" as appears by the said return made pursuant to the said last mentioned act, verified by the solemn declaration of the said William Hughes, one of the officers of the said society, &c., on or about the 26th day of March 1840; and lodged at the Stamp-Office Dublin, and by said certified copy thereof in the possession of plaintiff or his said solicitor, ready to be produced, &c. That the said Thomas Hodges as such public officer of the said society, &c., and also the said John Chambers, John Dwyer, Philip Jones, Charles Malley, Joseph Robinson Pim, Gustavus Wilson, and Henry Watson, acting as Directors or Managers of the said society, &c., upon such the stoppage of payment of said society, &c., and since, have possessed themselves of the said personal estate, credits and effects of which the said society, &c., were so possessed of or entitled to at the time of the said society, &c., so stopping payment, consisting of bills of exchange, promissory notes, bonds, securities for money, shares in public and other companies, Government and other stock, cash, Bank of Ireland and other bankers' notes, and various other effects and securities of the particulars of which plaintiff was ignorant, but amounting altogether to a very large sum and to upwards of £100,000; and that the said several defendants or some of them had called in and procured or obtained from the various Managers of the different Branch Banks of the said society, &c., all, or the greater part, or a very considerable part of the assets and property which belonged to the said society, &c., at the time of such stoppage of payment, and had applied a portion thereof as the said defendants thought fit; and the said society, &c., and the said several persons so named in said bill as defendants had

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received and discharged, and then were proceeding to receive and discharge various sums of money which were due to the said society, &c., at the time when it so stopped payment as aforesaid, in violation of the provisions of the said statute, passed in the 33rd year of the reign of his said late Majesty King George the Second; and that the said defendants had in their possession or power the said securities and the various books of account, and books containing the minutes and entries of the proceedings of such society, &c., but then refused to discover and disclose to plaintiff the particulars thereof.

The bill then charged, that under the provisions of the said last-mentioned act, plaintiff and the other creditors of the said society, &c., who were such at the time of the stoppage of payment of the said society, &c., were now entitled to have the assets, estate, credits and effects of the said society, &c., applied and administered in this Honourable Court, pursuant to the provisions of the said last mentioned act, and to have the relief by said bill sought against the said society, &c.; and that since the said 19th day of June 1840, the said society, &c., had made various partial payments to creditors of said bank, who were such at the time of the said stoppage of payment; and the said Thomas Hodges and William Hughes, as the public officers of the said society, &c., had, since the said 19th of June 1840, at various times given, and caused to be signed and given by their attorney or attornies, or the attorney or attornies acting for the said co-partnership, pleas of confession and warrants of attorney to confess judgment and judgments in various sums at the suit of persons who were creditors of the said society, &c., at the time of such stoppage of payment, and thereby afforded to such persons an undue and unfair preference to other creditors, contrary to the provisions of the said act.

That the said Thomas Hodges, who was now sued as the nominal defendant for and on behalf of the said society, &c., called the Agricultural, &c., combining and confederating to and with the said James Chambers, John Dwyer, Philip Jones, Charles Malley, Joseph Robinson Pim, Gustavus Wilson, and Henry Watson, and to and with various persons to plaintiff unknown, now gave out and pretended that the several matters thereinbefore stated and charged were not nor were any of them true; the contrary of which pretence plaintiff charged to be the fact and truth. That the said defendants at other times pretended that the said society, &c., was not a society or co-partnership of bankers in Ireland; the contrary of which plaintiff charged, &c.; and that said society, &c., did carry on the trade and business of bankers in Ireland previous to and in the years 1838 and 1839, and from thence until the 18th and 19th of June 1840, at the several places in Ireland, &c. That the said defendants at other times pretended that plaintiff did not deposit or lodge at the said banking-office of the said society or co-partnership, at Roscrea aforesaid, the several sums of money, &c.; the con-

trary of which, &c.—Further pretence, that although plaintiff lodged the several sums, &c., and still held the said promissory notes, they had been fully paid by or on behalf of the society, &c.; the contrary of which, &c. Further pretence, that the said society did not stop or suspend payment at the time or times in hill stated; the contrary of which, &c.: and plaintiff charged that the said Directors, with the view (if possible) of evading the provisions of the said act of the 33rd of G. 2, by the said Thomas Hodges, as said Dublin Agent, upon and since the said 18th day of June 1840, by order of the said Board of Directors, directed the Managers of the said several Branch Banks of the said society, &c., to keep open the said public banking-offices of the said company during the hours of each day for which the same had been theretofore usually kept open for business, and directed the said several Managers, or some of them, not to refuse payment of the promissory notes of, or such drafts or charges on the said society, &c., but to state to the persons who should apply for payment thereof, to the effect that payment thereof was suspended and declined for the present; which direction, plaintiff charged, was a mere subterfuge, and a fraudulent attempt to evade the provisions of the said last-mentioned act.

The bill prayed that the plaintiff and the other creditors of the said society, &c., who were such at the time of such the stoppage of payment of said society, &c., might be declared to be entitled to be paid their demands out of the said personal estate of the said society, &c., at the time of such stoppage of payment, pursuant to the act of Parliament passed in the 23rd year of his said late Majesty King George the Second, and by the said society, &c.; and accordingly, that an account might be taken by one of the Masters of this Honourable Court, of such the personal estate, credits and effects of the said co-partnership at the time of such stoppage of payment, and of the nature and particulars thereof, and whether any and what part or parts thereof, had been since received by any person or persons, and by whom, and how the same had been applied and disposed of; and that a receiver might be appointed to call in and collect the same for the purposes of this suit; and that an account might be also taken of the debts due by the said society, &c., at such the time of its stoppage of payment, and particularly of the sum due to plaintiff upon foot of his said deposits and of said promissory notes; and for that purpose, that such the creditors of the said society, &c., might be at liberty to go before the said Master and prove their demands; and in case it should be found that the said defendants had received any part of such the personal estate, effects, credits or assets of said society, &c., upon or since the said 19th day of June 1840, that such defendants, or such of them as should appear to have received the same, or to be chargeable therewith, might be decreed to bring in and lodge to the credit of this cause the sum or sums which

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should appear so to have been received by them respectively, to be applied as this Honourable Court should direct; and that, out of the funds to be realised from such personal property, estate, credits and assets, and to be so brought in to the credit of this cause, the demands of plaintiff and of such the other creditors of the said society, &c., at the time of such stoppage, and plaintiff's costs of this suit, might be paid; and in case the produce of such personal estate should be found insufficient fully to discharge such debts and costs, that the said society, &c., might be decreed to pay to plaintiff, and to such the other creditors of the said co-partnership, the residue of the sums so to be found due to them respectively; and in the mean time, that the said society, &c., its officers and servants, and the said several defendants might be restrained by injunction from interfering with or receiving any part of the personal estate, &c., and from converting or disposing of any of the property of the said society, &c., or from signing or giving any plea or pleas of confession current in Ireland, or warrant of attorney to confess judgment to any of the creditors of the said society, &c.; and that the said society, &c., and the said defendants might be ordered to bring in and deposit in the proper office of this Honourable Court, all books of account containing entries or minutes of proceedings of the said society, &c., or any of its branches, and all cash, Bank of Ireland notes, or notes of other bankers, bills of exchange, bonds, promissory notes, and other security for money, and other property of said society, &c., in the possession, power, or custody of the said society or co-partnership, or the said defendants, or any of its officers, managers, clerks or servants, to be disposed of as this Honourable Court should direct. Prayer of general relief, &c.

To the foregoing bill the defendant Thomas Hodges, as public officer, demurred, on the following grounds:—

First: That no case was made for the discovery or relief sought.

Second: That it appeared by the bill that said society, &c., consisted of upwards of three thousand persons, members and co-partners, and that it consequently appeared thereby that the said members or co-partners were necessary parties to the said bill, inasmuch as it was thereby prayed that an account might be taken of the personal estate, credits, and effects of the said co-partnership, at the time of the stoppage of payment in bill stated; but that the said several members and co-partners had not been made parties to the said bill: Wherefore, &c.

Third: That the plaintiff had not in and by his said bill, to which this defendant was made a party in his character of public officer of said society, &c., shewn that he could have any decree against this defendant, or that this defendant had any right, title, or interest in the matters and things complained of by said bill; nor had plaintiff shewn any right to

call upon this defendant in a Court of Equity for a discovery of the said matters or things or any of them, or that defendant as such public officer represented the said society, &c., for the purposes of this suit: wherefore, &c.

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Mr. James Dwyer for the demurrer.—

1. The bill does not shew any equity entitling the plaintiff to the discovery or relief prayed.—The plaintiff calls upon this Court to carry into effect against the society or co-partnership called the Agricultural and Commercial Bank the provisions of the 33rd of *G. 2*. That statute has been so recently and fully considered by the Court when the plaintiff moved for an injunction on the filing of the bill, that I shall not at present do more than rely generally upon the arguments by which I then endeavoured to demonstrate that the 33rd of *G. 2* is inapplicable to Joint Stock Banking Companies formed under the 6 *G. 4*, c. 42. The former statute exclusively contemplated co-partnerships of some three or four persons who were themselves the operative bankers, and whose dealings should properly be attended by the most unlimited and immediate liability. The latter act was passed to facilitate and encourage the formation of companies whose partners should be so numerous as to render the failures common to companies of a few persons, almost impossible;—to induce the flow of English capital into Ireland;—and to establish a distinct code whereby the liabilities of co-partners should be defined, and the utmost facility afforded to creditors of the company for enforcing their demands at law. The power which, under this act, the shareholder has of transferring his share, and, after a certain time, of getting rid of his co-partnership liability, is altogether inconsistent with the supposition that the 33 *G. 2* applies to companies under the 6 *G. 4*. The provisions in the two acts contemplated totally different cases; if, however, they are to be applied to the same case, they are inconsistent; and it is a familiar rule that, without express words, a subsequent statute repeals a former one with which it is inconsistent. In *Vincent v. Going* (a), Sir Anthony Hart, C., doubted that the Bankrupt Act, the 36 *G. 3*, repealed the 33rd of *G. 2*, but the very existence of a doubt in that case furnishes a persuasive argument to shew that the 33 *G. 2* is totally inapplicable to such a co-partnership as that of the Agricultural and Commercial Bank.

But supposing, for sake of argument, that the 33rd of *G. 2*, is unrepealed and applicable to co-partnerships formed under the 6th of *G. 4*, this bill would still be bad for want of equity. Here, a simple contract creditor who has a clear, summary, and complete remedy at law under the 6 *G. 4*,—whose entire demand is less than £200,—calls upon this

(a) 2 Law Rec. O. S. 258.

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Court to take the administration of assets stated to exceed £100,000, and at the same time, leave the shareholders liable to actions under the 6 G. 4,—for, until decree, the creditors of the company could not be restrained. In order to entitle a party to come to this Court for relief, it is necessary for him to shew by his bill, either that the law does not afford any sufficient remedy for such a case as his, or that there are impediments in the way of the legal remedy. But nothing of the kind has been, or with truth could have been, suggested in the present bill; and the Court must have judicial cognizance of the fact that the plaintiff has a complete and summary remedy at law, instead of which he has chosen a proceeding in this Court, which, if entertained, must be productive of enormous costs and almost interminable litigation. If there could be any reasonable doubt of the sufficiency of the assets of the company to discharge its liabilities, the course which is here taken should have the effect of converting the doubt into a certainty: every holder of a promissory note for twenty shillings would be entitled to prove a charge under the decree, and to have, according to the course of the Court, £5 for his costs of so doing: therefore, whether this bill be regarded in the view of public policy, or as a mere matter of pleading, it is plainly bad; *Parry v. Owen* (a); *Keogh v. Keogh* (b); *Commissioners of Kingstown v. Kirwan* (c); *Miff. Pl.* 102; *Harnett v. Yielding* (d); *Hovenden v. Lord Annesley* (e); *Whitechurch v. Hyde* (f).

2. Independently of the general objection for want of equity, this bill is clearly bad as a bill under the 33 G. 2, for want of parties. The 33 G. 2 declares expressly, that the trusts created under it shall be for the benefit of *all* the creditors of the bankers; but this bill asks to have the trust administered only in behalf of the plaintiff and such of the creditors of the society 'as will come in and contribute to the expenses of this suit.' Again, this bill, if under the 33rd of G. 2, should have treated all the shareholders as individual bankers, and prayed an account of their *real* and personal estates, and also for relief on behalf of their *separate* as well as their joint creditors; *Hayden v. Carroll* (g); but the relief here sought is limited to the plaintiff and such creditors of the *society* as shall come in and contribute, &c.,—and to the personal estate, assets and effects of the society; with a contingent prayer in the event of such personal estate proving insufficient, that there may be a decree for the residue against the society. This bill, therefore, seeks only a partial execution of the trust of the statute, and it is bad upon that ground: *Purefoy v. Purefoy* (h); *Knight v.*

(a) 3 Atk. 740.

(c) 1 Crawf. & Dix, 41.

(e) 2 Sch. & Lef. 638.

(g) 3 Ridgw. P. C. 454.

(b) 2 Mol. 91.

(d) 2 Sch. & Lef. 549.

(f) 2 Atk. 391.

(h) 1 Vern. 39.

Knight (a). The 33 G. 2, as applicable to such a co-partnership as that of the Agricultural Bank, must be admitted to be a highly penal statute, and ought to be construed strictly. If the shareholders of the company are to be treated as individual bankers, and if all their property of every description is to be liable to be administered in this Court, not only in discharge of their joint liabilities as bankers, but also of their separate liabilities as private individuals, they should certainly have been made parties: for, the public officer of the company under the 6 G. 4, although representing the co-partnership, is not the representative of the individual shareholders in their private transactions. An account of their separate debts could not be properly taken in their absence; and upon this ground the plaintiff's bill is bad; *Mallett v. Boileau (b)*; *Blain v. Agar (c)*.

3. Finally, relief is sought against the defendant Mr. Hodges as a substantial defendant, although the bill states that he is brought before the Court and sued as the public officer, and mere nominal defendant on behalf of the society: therefore, the demurrer should be allowed upon this ground also; as it is well settled that a party should be brought before the Court in the character in which he is sued: *Rathborne v. Thomas (d)*.

Messrs. *W. Smith, Monahan, Q. C.*, and the *Solicitor-General*, for the bill.

The questions upon this demurrer are, first—Whether the 33 G. 2 applies to co-partnerships formed under the 6 G. 4? and if so—whether the plaintiff's bill is properly framed, and whether the proper parties have been brought before the Court? The first question must be considered altogether irrespectively of the inconveniences about which so much has been said on the other side: the inconvenience of any particular state of the law is for the consideration of the Legislature, and not of the Court. In *Hall v. Franklin (e)*, the argument of inconvenience applied much more strongly than it does here; but it was held that a Joint Stock Banking Company could not recover in an action on a bill of exchange, because two of its members were beneficed Clergymen, contrary to the act of Parliament. The Legislature accordingly interfered, and passed the 1 Vic. c. 10.

In order to arrive at a correct conclusion respecting the intention of the Legislature when enacting the statutes of 33 G. 2, c. 14, and the 6 G. 4, c. 42, respectively, it will be necessary to consider the several acts relating to banking co-partnerships which have been passed from

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(a) 3 P. Wms. 330, 333, Mitf. Pl. 148.

(b) 3 Law Rec., N. S. 204.

(c) 1 Sim. 37.

(d) Hayes, 97.

(e) 3 Mee. & Welsb. 259.

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time to time, and how the law stood at the respective periods at which the two statutes in question were enacted.—The first act upon the subject is the 8 G. 1, c. 14, the first section of which provides that where a banker refuses payment of one of his notes, it shall bear interest from that time forth; and thus, interest became payable in respect of things which in their nature were not liable to it. It is further declared, that where a banker stops payment and absconds or conceals himself from his creditors, all deeds or conveyances made by him of any estate whether real or personal shall be void, as against all persons to whom any sum of money shall be due at the time of his absconding. And by the fifth section, all deeds and conveyances executed by the banker should be enrolled in the Court of Chancery and a memorial of them registered, otherwise they should be deemed fraudulent and void as against his creditors. The next in order was the 29 G. 2, c. 15, which required that the names of the several bankers should be set out in their notes, and prohibited them from trading as merchants. Then came the 33 G. 2, which repealed the 8 G. 1, but only for the purpose of re-enacting it with more stringent provisions in favour of the bankers' creditors. By this statute, the deeds and conveyances by bankers are to be registered, and their notes, after refusal of payment, to bear interest as before; and by the sixth section it is enacted, that, "all deeds and conveyances theretofore made, or thereafter to be made, by any banker, of any real or personal estate to him belonging, either in law or in equity, after the time such banker should abscond or conceal himself from his creditors, or after the time such banker should stop payment, *although the same should be made for valuable consideration*, should be null and void to all intents and purposes whatever, unless made to the use of or in trust for all creditors of such banker according to the order or course in which the debts of such banker ought to be paid, or unless such deed or deeds should be accepted of and agreed to by all the creditors of such banker, in either of which cases such deed or deeds should be valid and effectual." It is also provided that "if any banker or bankers after he or they shall stop payment shall receive or discharge any sums of money due to him or them at the time he or they shall stop payment, every such receipt and discharge shall be absolutely null and void." Then follows the eighth section, by which it is enacted that immediately after the stoppage of payment all the real estate, and all the personal estate, credits and effects whatsoever, either at law or in equity of which such banker shall be seized, possessed of, or entitled to, at the time of stopping payment, shall be liable to payment of all debts without priority or preference. The tenth section provides for the administration of the trust thus created in favour of the creditors, by means of a trust deed; provided, a majority in number and value of the creditors

shall approve of the trustees, and that such deed be executed within three months after the stoppage of payment; and the bankers are thereby required to vest either the whole of their real and personal estates, *or so much thereof as shall be sufficient to pay all their debts.* Here, it may be observed, in passing, that if the Court shall be of opinion that this statute applies, the section just mentioned furnishes a complete answer to one of the objections urged against this bill; namely, that it seeks only a partial execution of the trust: for, *Hayden v. Carroll* settled the rule, as to the application of the funds—viz.: the partnership property to be applied in the first instance to the partnership debts, and the separate property to the separate debts; and in case of deficiency of either the joint or separate property, the creditors of either class to resort to the surplus after payment of the other, as in cases of bankruptcy. It is stated in the bill, and admitted by the demurrer, that the partnership property, in the present case, is more than sufficient to discharge the liabilities of the company; and it does not appear that the shareholders have any other liabilities: therefore, it was the proper course to limit the prayer for an account to the joint property.

But to return to the main question:—it is evident that the policy of the 33 G. 2, was to provide against every species of fraud which might be practised by banking co-partnerships, and to give to creditors the utmost possible security; and it is to be borne in mind that under this statute there is no limit to the number of persons who might enter into partnership as bankers. If this act is unrepealed it is clearly applicable to the present case, and it lies upon the other side to shew, if they can, that it has been repealed. The following are the statutes relating to bankers, enacted since the 33 G. 2.—First, the 21 & 22 G. 3, c. 16, under which the Bank of Ireland was established, and whereby a restriction was for the first time imposed upon the number who should enter into a banking co-partnership, and such number was limited to six. The Company of the Bank of Ireland having afterwards consented to give up the benefit of this restriction, in consideration of certain other privileges to be allowed them in its stead, the 1 & 2 G. 4, c. 72, was passed, whereby the restriction as to the number was taken off, and banking co-partnerships of any number of partners became entitled to issue notes payable on demand, &c., provided they did so at a distance of not less than fifty miles from Dublin. It could not be pretended that there is any thing in either of the statutes just mentioned which repeals or limits the application of the 33 G. 2. All restriction as to the number of partners in a banking establishment was removed by the 1 & 2 G. 4, as already mentioned, but that statute did not give to such co-partnerships any right to sue or be sued by a public officer, nor did any such right exist until it was conferred by the 5 G. 4, c. 73,

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which purported to be, amongst other things, an act 'to relieve bankers 'in Ireland from divers restraints imposed by the provisions of the '29 G. 2, c. 16.' Those restraints—namely, the necessity of setting out the names of the several bankers on each of their notes, and the prohibition against their trading as merchants—were accordingly removed. Had the Legislature then intended to repeal the 33 G. 2, they must have done so expressly, for certainly it was down to that time unrepealed, and the whole of the Bankers' Code must then have been under the consideration of Parliament; yet there is nothing in the 5 G. 4, either expressed or implied, which affords the least evidence of any such intention: facilities were thereby afforded for establishing co-partnerships upon a large scale, but the creditor's security was carefully retained. This last mentioned act having been found insufficient for the purpose of fully carrying out the intention of the Legislature, the 6 G. 4, c. 42, was passed. It is entitled 'An act for the better regulation of co-partnerships of certain bankers in Ireland,' and carries out what seems to have been the general intention of the Legislature when enacting the 5 G. 4.

On the motion for an injunction,* it was contended on the part of the Agricultural Bank, that the second section of the 6 G. 4, which after authorising the trading of an unlimited number of partners as bankers, introduces the words 'all individuals composing such societies or co-partnerships, being liable for the due payment of all such bills and 'notes in manner hereinafter provided,' should be construed to limit the liability of such persons to the particular provisions of this act. But the Court could not adopt such a construction. The words relied upon are merely affirmative, and are not repugnant to the 33 G. 2; and it is plain that they were intended merely to give judgments against the public officer the same operation and effect as judgments against the company should otherwise have had: for, the same clause, with the exception of the words 'in manner hereinafter mentioned,' is in the 1 & 2 G. 4, which did not give the right of suing or being sued by the public officer; but such right having been given by the 6 G. 4, which recites that it is expedient that 1 & 2 G. 4 should be altered and amended, to the clause in that act are added the words 'in manner hereinafter mentioned,' so as to give proceedings against the public officer the same validity and effect, as they should have had against the company under the 1 & 2 G. 4. There can be no question that the equities of the 33 G. 2 could have been had against a company under the 1 & 2 G. 4; and if that be so, they can now be had against the public officer as the representative of the company. The 6 G. 4 did not take away any portion of the security which the creditors of bankers previously

* The motion immediately after the filing of the bill, which was refused.

had. Although it confirmed the repeal of the provisions in the 29 G. 2, requiring all the bankers' names to be set forth upon their notes, it substitutes an equivalent and more convenient security by requiring a return on oath to be annually registered at the Stamp Office, containing the names of all the co-partners. The 8 G. 1 is repealed, and the 29 G. 2, repealed specially as to two sections of it, but the 33 G. 2 is left untouched in the whole series of the subsequent enactments. The 16th section of the Bankrupt Act declares that a banker shall not be made a bankrupt; why?—because when a bank stops payment, the 33 G. 2 immediately applies and affords to the creditors their proper remedy. The 33 G. 2 is the only act which gives any particular effect to the stoppage of payment by a banking company, namely, that *ipso facto*, a trust of all the banker's real and personal estate is thereby created for the creditors; and the 17th section of 6 G. 4, provides that the bankruptcy, insolvency or *stopping payment* of any public officer of a banking company in his individual character or capacity, shall not be construed to be a stopping of payment by the society itself. That section, therefore, appears to be a direct reference to the 33 G. 2. It is not imperative upon a company under the 6 G. 4, to sue by its public officer; *St. Patrick's Assurance Company v. Morgan (a)*; *Pentland v. Hervier (b)*; and although we avail ourselves of the right given by the 6 G. 4 of suing the public officer, we are not limited to the remedy given by that act, and prefer the better remedy of the 33 G. 2. Much has been said of the practical inconvenience of the construction for which we contend; and although such considerations can have little weight in this case, it may be observed that the construction contended for on the other side would be liable to consequences, which, besides being most inconvenient, would be altogether inconsistent with the plain policy of the law. Suppose a company of seven persons formed under the 1 & 2 G. 4;—they could have easily traded as bankers without the aid of a public officer, and would have been clearly liable to the 33 G. 2;—they might obtain a very large amount of money upon their notes;—they might have very large real estates, and might have executed conveyances of that property, which under the 33rd of G. 2 would have been void either as being in favour of children or for want of registry. In such a case, according to the construction contended for on the other side, such a company, by merely registering a public officer and the partners' names under the 6 G. 4, would avoid their liability under the 33 G. 2, and render the void deeds valid and effectual.

The technical objections to the frame of this bill have already been touched on incidentally, and now assuming that the 33 G. 2 applies, it is proper to give them distinct answers. To the objection that the

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(a) 2 Hud. & Bro. 119.

(b) 2 Hud. & Bro. 442.

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plaintiff has a clear remedy at law, the answer is that the bill states a case of fraud and trust admitted by the demurrer, and that this Court has a concurrent jurisdiction: *Conry v. Caulfield* (a); *Fay v. Fay* (b). If after the stoppage of payment, a trust deed had been executed pursuant to the 10th section of the 33 G. 2, this Court would have executed such trust; and although no such deed has been executed, this bill proceeds on the principle that this Court will not permit a clear trust to fail for want of a trustee. A complete answer has already been given to the allegation that this bill seeks only a partial execution of the trust of the statute. As to the objection for want of parties, it is to be answered, that by the 10th section of 6 G. 4 it is provided that all suits in equity against any company formed under that act, may be commenced and prosecuted against the public officer; and by the 14th section it is enacted, that a decree against the public officer shall have the like operation and effect against the property of the co-partnership, and *against the person and property of each member*, as if all the members were parties before the Court. Therefore, the company is sufficiently represented in this cause even if the joint property should turn out to be deficient, and it should become necessary to seek the residue out of the separate estate of the individual shareholders. It is well settled that where the proper parties are before the Court, it can, under the prayer of general relief, make such decree as the nature of the case made by the bill requires, although not specifically prayed for: *Heirn v. Mill* (c); *Wilkinson v. Beal* (d).

Mr. Smith, Q. C., in reply.—It must be admitted that the 6 G. 4 is a new and complete code for the regulation of banking co-partnerships, and for the security of their creditors;—that the creditors have under that statute a summary and complete remedy at law; and that, although it expressly saves some provisions in former acts of Parliament, it mainly proceeds upon a principle which is the result of modern experience, and unknown to the previous legislation upon the subject—the public policy and advantage of Joint Stock Banking Companies including such a number of partners as to shut out the possibility of bankruptcy or loss to the public. It cannot be denied that such an institution is a modern invention, and is totally different in its nature from co-partnerships of some three or four persons, themselves the operative bankers. Although the 21 & 22 G. 3 was the first act which positively limited the number of co-partners in banking companies, and although, as has been said, companies under the 33 G. 2 might have comprised any number of partners, such a society as that of the Agricultural Bank had never

(a) 2 B. & Beat. 272.

(b) 5 Law Rec. N. S. 196.

(c) 13 Ves. 114.

(d) 4 Mad. 406.

existed in this country,—its principle and machinery were alike unknown, and cannot be said to have ever been fully within the contemplation of the Legislature, nor provided for by it until the 5 G. 4, which being found insufficient, was soon afterwards repealed, and followed by the statute already mentioned. It is obvious that such banking companies as the Legislature had in view when the 33 G. 2 was passed, were totally different in their nature and principle from the company contemplated by the 6 G. 4; and common sense suggests that as, beyond all question, the principles and the leading provisions of the 6 G. 4 would be altogether inapplicable to such a company as was contemplated by the Legislature when enacting the 33 G. 2, the provisions of that act should be alike inapplicable to the company of the 6 G. 4. The Legislature, seeing the beneficial effects of Joint Stock Banks in Scotland, desired to encourage and provide for the formation of similar establishments in this country, and for that purpose adopted a new principle of legislation respecting banking co-partnerships, the policy of which plainly is, to induce as many persons as possible to become partners in such companies. The second section, which enables such companies to carry on the trade and business of bankers, does not prohibit either English or Scotch capitalists from being members; on the contrary, the fifth section expressly declares that neither that nor any previous act shall be construed to prevent any person resident in Great Britain and Ireland from being a member of such co-partnership. It appears that the shareholders in the Agricultural Bank are upwards of 3,000; and, for any thing that appears to the contrary, 2,500 of those shareholders may be English capitalists, resident and having in England large real and separate estates. It could not be pretended that the provisions of the 33 G. 2 could apply to them;—that on the death of an English shareholder, his property in England cannot be administered there according to priority—that his family settlements, and any provision he may have made for his children and grandchildren are to be void. That would certainly be a bad return to the English or Scotch capitalist, who may have been willing to extend the benefit of his capital to the institutions of this country. But where is the jurisdiction in this Court to reach real estate in England or Scotland? There is no such jurisdiction. Where is the remedy against the English shareholder but under the 6 G. 4, which enables the creditor obtaining a judgment against the public officer to enter up judgment in England, and to have execution there against the English member? There is none; and yet the company contemplated by the 6 G. 4 may consist entirely of English members. The 33 G. 2 contemplates and deals with an *entire* company; but to the company under the 6 G. 4, it may be wholly inapplicable, and in scarcely any case could it be supposed as applicable to the whole. Was this a *casus omissus*—an oversight on

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the part of the Legislature? By no means: the company which it contemplated is fully considered and provided for, and the most complete security, with a summary remedy at law, afforded to the creditor. If the creditor's security or his remedy under the 6 G. 4 was inconvenient or incomplete, there might be some colour of reason and justice for endeavouring to strain into the service an old statute, notwithstanding the difference of its principle and the extreme severity of its application. But that the 6 G. 4 gives a summary and ample remedy, there can be no doubt; and it is impossible to avoid perceiving that such a suit as the present could never have been adopted, if it had not been well known that a company of upwards of three thousand persons, representing property to an immense amount, must be not merely an abundant security for the debts of the co-partnership, but also for the utmost amount of costs that ingenious devices could heap upon them. As to the 17th section of the 6 G. 4, which is said to amount to a direct reference to, and recognition of the applicability of the 33 G. 2—unfortunately for that argument, the very same words are to be found in the 7 G. 4, c. 46, which is an act relating to bankers in England, where there is no such statute as the Irish act of 33 G. 2.

But supposing the 33 G. 2 to be applicable to the Agricultural Bank, the bill in the present case is not sustainable under that statute. *Hayden v. Carroll*—a case of the highest authority upon the subject—clearly shews, that under the trust of the 33 G. 2, all the bankers' creditors, as well separate as joint, are entitled to be paid rateably, and that the separate as well as the joint estate is to be administered for that purpose. Therefore, a bill seeking in this Court the execution of that trust should have been on behalf, not merely of the plaintiff and such other creditors of the company as would contribute to the expenses of the suit, but on behalf of all the creditors of the company, and of all the separate creditors of the individual shareholders; and it should have prayed an account of their separate as well as their joint debts, and of their separate as well as their joint property. We admit that the public officer represents the company and the several shareholders to the full extent of the company's liabilities, but he does not represent the shareholders to the extent of their private and individual liabilities; yet, that would be necessary to make the present bill sustainable under the 33 G. 2. The shareholders should therefore have been made parties: *Van Sandau v. Moore* (a); *Long v. Yonge* (b). To the objection, that on the face of this bill it appears that there is a clear remedy at law, it is said (assuming the applicability of the 33 G. 2), that there is here a trust—that from the 18th June 1840, when the bank stopped payment, the members ceased to be bankers and became trustees. Such would, no

(a) 1 Russ. 441.

(b) 2 Sim. 369.

doubt, be the effect of the 33 G. 2; but the pleader has omitted to observe, that as the members of the Agricultural Bank are mere trustees, they cannot be at all represented by a public officer. Perhaps this affords a sufficiently clear illustration of the total inapplicability of the 33 G. 2 to a company formed under the 6 G. 4. The public officer represents the company for the purposes of the act, but not for the purposes of a trust created by a different act of Parliament. It might perhaps be reasonable that the public officer should represent the company for the purpose of account, but not for the purpose of an equitable execution against the separate property of the individual members; and accordingly, where there is a judgment at law against the public officer, the individual member sought to be affected by it, must be brought before the Court by *scire facias*: *Bosanquet v. Ramsford* (a); *Cross v. Law* (b).

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The MASTER OF THE ROLLS, after recapitulating the pleadings, now pronounced his judgment upon this case to the following effect:—

Jan. 25.

Two questions have been raised upon this demurrer: first, whether a banking company formed under the 6 G. 4 is liable to the provisions of the 33 G. 2; and secondly—supposing the banking company to be so liable—whether the present suit has been rightly constructed, to have the benefit of the statute. As to the first point, several arguments have been used to shew the inconsistency of the provisions in the 33 G. 2, and those of the 6 G. 4; and amongst others, that the words “liable in manner hereinafter provided” in the second section of 6 G. 4, exempted co-partnerships formed under that act from any other liability than it imposes. But those words are affirmative; and I cannot understand them otherwise than as providing against the practical inconvenience of a company consisting of a very great number of partners, by enabling it to sue or to be sued as one man. It is obvious that some such provision was necessary to prevent the creditor’s security from being extinguished altogether: for a suit to which there should be three or four thousand defendants, or perhaps three or four-and-twenty thousand defendants, could not be a practicable remedy, or indeed a remedy at all. Therefore the company is to be represented by a public officer, and the words “in manner hereinafter provided,” were introduced, as it seems to me, not for the purpose of limiting the creditor’s remedy against the company to the particular proceeding therein mentioned, but of rendering the creditor’s remedy either under that or any previous act still in force as immediately and easily available as if the entire company was comprised in a single person. The statute of the 1 & 2 G. 4, which was the first that removed the restrictions imposed by the

(a) 3 Per. & Dav. 298.

(b) 6 Mee. & Welsh. 217.

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21 & 22 G. 3, as to the number of persons who might enter into banking co-partnerships, contains in the sixth section the same clause as that in the second section of 6 G. 4, excepting only the words "in manner hereinafter provided," which were omitted; because, as it would seem, what those words refer to—namely, the right and liability of such a company to sue and be sued by a public officer—are not to be found in that act of Parliament. It is perhaps not to be wondered at, that when the Legislature first approached the subject of the restrictions upon the number of partners in banking companies, and determined that such companies might include more than *six* partners, the possibility of their presently starting up with five or six thousand, was not contemplated; and that therefore the practical difficulty or impossibility of copartnerships of *more than six* persons suing or being sued, did not appear. But so soon as the omission was discovered, the 5 G. 4 was passed; and that act having been found insufficient, was followed by the 6 G. 4, whereby the 1 & 2 G. 4 is "altered and amended;" the right and liability of suing and being sued by a public officer, provided; and to the clause in the sixth section of 1 & 2 G. 4, respecting the liability of such companies for the due payment of their bills and notes, are added the words "in manner hereinafter provided." I cannot give a negative effect to those words, which seem to me to have been intended not to limit but to facilitate the remedy. They are merely affirmative; and in *Hayden v. Carroll* (a), it is said, "that a subsequent affirmative statute may repeal a prior one, if the words are contrariant. But it is equally clear, that if there be two affirmative statutes made upon the same subject, in all points in which they do not contradict each other, both shall stand." So, Sir Orlando Bridgman, in his Reports (b), lays it down as a rule for the interpretation of statutes, "that the law will not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words may have their proper operation without it. That is frequent in construction of grants, much more of acts of Parliament." It is not suggested that the 33 G. 2 ever was repealed, unless it has been by the 6 G. 4; it is admitted that it would have applied to a company under the 1 & 2 G. 4; and the policy of the 6 G. 4 seems to have been to facilitate for the creditor the remedies which he should have had under the 1 & 2 G. 4. I think that the provisions of the 33 G. 2 may stand with those of the 6 G. 4,—that there is no inconsistency between them, and that the former statute is unrepealed.

As to the inconvenience which may attend the application of the provisions of the Bankers' Act to a company formed under the 6 G. 4, that is for the consideration of the Legislature, and not of the Court. If it be said that to a company as numerous as the present, and formed

(a) 3 Ridg. P. C. 599.

(b) In *Lyn v. Wyn*, Sir Orlo. Bridgm. 127.

under the 1 & 2 *G.* 4, the application of the provisions of the Bankers' Act would have been impracticable in consequence of the vast number of necessary parties to the proceeding, that argument would go to deprive the creditor of any remedy whatever; and the question for the Court is not whether the remedy be convenient, but whether the law has given it? But it may be asked whether the provisions of the 33 *G.* 2 might not as easily have been applied to companies comprising seven or eight or ten members, as to companies of six? and how is the Court to draw a line where the law has drawn none—or say that down to this or that particular number the statute shall apply, but if one more be added, the creditor must be deprived of the remedy which the law has provided for him? As I have already said, I can discover nothing in the provisions of the 33 *G.* 2 inconsistent or irreconcilable with those of the 6 *G.* 4, and the difficulty in particular cases of applying the former provisions to companies formed under the latter statute, may be a fit subject for the consideration of the Legislature, but could not warrant this Court in depriving the creditor of his remedy. I cannot understand why the applicability of a remedy ought to depend upon the particular number of partners of which a company may consist.

However, it has been urged that companies under 6 *G.* 4, may consist for the most part or entirely of English members, whose residence and property are situate in England, and it has been said that as to them the provisions of 33 *G.* 2 could not be enforced, they should be alike inapplicable to Irish members and property situate in Ireland. But this argument could not be maintained, and like some of the others already noticed, would go too far: for English or Scotch capitalists were as eligible to be members of companies of six or less than six members formed under the 21 & 22 *G.* 3, or of more than six members under the 1 & 2 *G.* 4, as they now are to be members of companies formed under the 6 *G.* 4; yet there is no doubt that the 33 *G.* 2 would have applied to companies under the former acts. It may be difficult or impossible for the Court to pursue property in England; but does it therefore follow that it will hesitate to act, or to enforce the provisions of the 33 *G.* 2 against property in Ireland and within its jurisdiction? If such an argument should be conclusive, it would be possible for every Irish Banking Company to evade the provisions of the 33 *G.* 2, by having a single shareholder, no matter how small his interest in the banking concern or his property might be, situate in England. Under the particular circumstances of the case, the law may not be able to reach all the property of the shareholders; but is that a reason why it is not to reach any, although enough and more than enough for its purpose may be within its power? It is said that the Irish members ought not to be placed in a worse situation than the English members, and that considering the severe restrictions imposed

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on bankers by the 33 G. 2, it ought not to be applied to *mere shareholders* in a banking company. To this I have only to say, that if the law be imperfect; or if, to carry out its provisions be attended with inconvenience or hardship to individuals, that is matter for the consideration of the Legislature; but I must deal with the law as I find it. It must also be remembered that persons entering into such partnerships and embarking in banking speculations for the purpose of profit, must be supposed to do so with full notice of the responsibility they incur, and ready to abide the consequences. From these considerations I must conclude that as the 33 G. 2 has not been repealed by any of the provisions of the 6 G. 4, banking companies under the latter act are not exempt from the liability which the former imposes.

I think that the demurrer fails also as to the objection for want of parties. The 10th and 14th sections of the 6 G. 4 render it quite sufficient in any suit either at law or in equity against a company formed under that act, to have the public officer before the Court as the representative of the co-partnership and of all its members: the separate as well as the joint property of the shareholders is fully represented by him. Although the stoppage of payment by the company created a trust for their creditors under the Banker's Act, I do not think it avoided the liability of the company to be sued through its public officer.

My opinion is also against the objection that this bill seeks only a partial execution of the trust created by the 33 G. 2: for if the shareholders had, after stopping payment, conveyed to trustees a *sufficient* portion of their property for payment of their debts, they would have fully complied with the provisions of the act; but it appears upon this record, that the co-partnership property is more than sufficient to discharge the liabilities of the company, and it does not appear that the members have any other engagements. If, in the progress of the cause, the Court should deem it necessary to direct an extension of the suit for the benefit of interests not at present appearing, it will be quite practicable to effect that object; but upon the case made by the bill, it appears to me that the suit is at present sufficiently extensive. Upon the whole, I am of opinion that the demurrer must be overruled.

THE INCORPORATED SOCIETY IN DUBLIN
FOR THE PROMOTION OF ENGLISH PROTESTANT SCHOOLS IN IRELAND

v.

WELLINGTON ANDERSON ROSE, Esq.

(*Chancery.*)

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Jan. 12, 13,
 14.
 Feb. 26.

THIS was a suit for a renewal.

King George the Second, by his letters patent under the Great Seal of Ireland, bearing date the 24th of October 1733, reciting, that there were large tracts of land in Ireland almost entirely inhabited by Papists, and that among the ways proper to be taken for converting and civilizing those persons, and bringing them in time to be good Christians and faithful subjects, one of the most necessary was always thought to be, the erecting of a sufficient number of English Protestant Schools, wherein the children of the Irish natives might be instructed in the English tongue and the fundamental principles of true religion, constituted certain persons, then holding certain dignities in Ireland (among whom were the Lord Chancellor and the Master of the Rolls), and those who should afterwards hold those dignities for the time being, together with certain of the chief Nobility, Gentry and Clergy, and such others as should from time to time be nominated in their place, to be a Corporation, and have perpetual succession, by the name of "The Incorporated Society in Dublin for promoting English Protestant Schools in Ireland;" and enabled them to hold lands of the yearly value of £2000, "in order that they should therewith and thereout maintain, "in all places in Ireland where they should think proper, such and so "many English Protestant Schools as they should think proper;" and his Majesty, by his said letters patent, gave them power to appoint "fit and proper persons as schoolmasters and schoolmistresses to teach "the children of the Popish and other poor natives of Ireland the English tongue, and to teach them to read, especially the Holy Scriptures

By a lease executed in 1747, a Member of the Incorporated Society demised to the Society a piece of ground, at a rent of 5s. and covenanted to renew the lease for ever. The lease contained a covenant, on the part of the Society, to build and maintain upon the demised premises a house fit for the "reception "and education of 20 "boys and 20 "girls, to be "nominated by "the Society, "according to "the true intent and "meaning of "their charter;" and a proviso for re-entry, in case the Society should not continue to educate 20 boys and 20 girls,

"according to the true intent and meaning" of the said indenture.

Up to the year 1819, the Society kept up a female Protestant boarding-school on the premises; but after that they gave it up, and kept a day-school, to which Roman Catholics were admitted. In 1830, they demised the school-room and land to a person, who erected a new house, fit for a day-school merely, and used the rest of the premises for farming purposes.

Held—That as the charter of the Society gave them power to make bye-laws, those acts were not breaches of the covenant, and formed no ground for refusing a specific performance of the covenant for renewal, although the charter was expressed to be granted for the instruction "of the children of the Popish natives in the principles of the Protestant religion;" the Court considering that the mode of instruction was left to the discretion of the members of the Society.

Whether evidence of conversations with the parties, or those under whom they claim, which are not specifically put in issue by the pleadings, will be received, is a question to be decided according to the circumstances of each case, and there is no inflexible rule on the subject.

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"and other good and pious books, and to instruct them in the principles of the Protestant religion, as established in Ireland; and to teach them to write, and instruct them in arithmetic and such other parts of learning as to the Society should seem meet;" the said Society providing for such children, or such of them as the Society should think proper, Bibles, Common Prayer Books, and other proper books, and giving them, or such of them as by the said Society should be judged deserving, proper encouragement, by providing clothes, diet and lodging, as to the said Society should seem meet, until such time as the said Society should judge such children fit to be put out to trades.

The charter also empowered the Society, at their quarterly meetings, to make such rules and ordinances, and from time to time to alter the same, as they should judge most convenient and needful for the good government of the Society, and the management of the affairs thereof: provided such rules and ordinances were not repugnant to the statutes then in force in Ireland, and were confirmed and approved of by the Lord Primate or one of the Archbishops for the time being, and one of the Lord Chief Justices or the Chief Baron for the time being.

In addition to the property which that charter empowered the Society to hold, they were enabled, by a charter of King George the Third, dated the 10th of January 1792, to hold lands to the amount of £2000 per annum.

By indenture, bearing date the 9th of July 1747, and made between his Excellency Lord Newport, then Lord Chancellor of Ireland and one of the Lords Justices of Ireland, of the one part, and the Incorporated Society of the other part, after reciting that the Society had agreed with Lord Newport to erect, upon the ground thereafter mentioned, a school for the education of twenty boys and twenty girls, Lord Newport, "in consideration of promoting so good and charitable a design," and in consideration of five shillings, conveyed and demised to the Society a piece of land containing twenty acres profitable land, near Newport, in the county of Tipperary, "as the same hath been lately set out for the use aforesaid:" to hold for three lives, at a rent of 5s. yearly. That lease contained a covenant on the part of the Society, within three years from the date, "to build and finish, on the demised premises, one or more house or houses fit for the reception, teaching and instructing twenty boys and twenty girls, to be from time to time nominated by the Society, according to the true intent and meaning of his Majesty's charter, whereby they were incorporated;" and also, that they would "at all times thereafter during the continuance of the said demise, well and sufficiently repair, amend and keep up such house or houses which should be so erected, according to the true intent and meaning" of the said indenture.

That lease contained a proviso, that if the Society or their successors should not erect and finish one or more house or houses on the demised

premises within three years from the date thereof, "and continue to "educate twenty boys and twenty girls, according to the true intent "and meaning" of the said indenture ; that then the said indenture should be void, and that it should be lawful for Lord Newport to re-enter.

The lease contained a covenant on the part of Lord Newport, for perpetual renewal, upon the payment of a fine of five shillings for every new life that should be added.

The last of the lives in the original lease died in 1805, and no effort was made to procure a renewal until the year 1837, when the solicitor of the plaintiffs, by a letter dated the 10th of January in that year, applied to the defendant, whose father (Richard Anderson Rose) had acquired the reversion of the demised premises, by a conveyance from the representatives of Lord Newport in 1804, and had devised the same, with other property, to defendant, for life, with remainder to his first and other sons in tail, requesting defendant to refer him to his solicitor, in order to lay before the latter a draft of a renewal.

The defendant having named a solicitor, a draft of a renewal was sent to him by plaintiffs' solicitor; and the draft not having been returned, plaintiffs' solicitor, on the 10th of February 1837, forwarded to the solicitor of the defendant a calculation of renewal fines, and requested that the draft renewal might be returned for engrossment. No answer having been given to this letter, a notice was served on defendant in person, requiring that the draft renewal should be returned. No answer was given to that application, but the defendant, on the 28th of September 1838, served a notice to quit, and the plaintiffs filed their bill on the 4th December 1838, praying a specific performance of the covenant for renewal contained in the lease of 1747.

The bill set forth the charter and the lease, and stated the application to defendant for renewal ; and charged, that although plaintiffs had not, from the date of the lease, educated and supported twenty boys and twenty girls, yet, that they educated and supported, until 1820, upwards of forty children of one sex ; and that the reason for the alteration in that respect was, the fear, lest, having children of both sexes under the same roof might prove injurious to their morals ; and that from 1820, when plaintiffs, under the circumstances of their institution, thought it expedient to turn the school into a day-school, they educated the same number of forty children, and upwards, of one sex.

The bill also contained the following charge :—" And your suppliants "charge, that the said W. A. Rose, and those claiming from and under "the said Lord Newport, must have been aware of the circumstances of "said school, same being well known in the neighbourhood and "country ;" and it charged, that in the year 1834, rent had been paid on behalf of plaintiffs to the uncle and receiver of the defendant ; and that in 1836, another payment had been made to Thomas Rose, who

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was trustee under the will of defendant's father; and that in 1837, another payment had been made; and it set forth the receipts passed, and relied upon those acts as a waiver of any forfeiture that might have been incurred.

The bill also charged, that plaintiffs caused the children attending the said school to be instructed in the principles of the Protestant religion, and caused them to be taught to read the Holy Scriptures and other good and pious books.

The defendant, by his answer, stated that he had no counterpart of the lease of 1747, and that he was not aware of the provisions it contained, until his solicitor was furnished with a copy of it by the solicitor for the plaintiffs, upon an application to that effect in February 1838; and that he then, for the first time, learned that plaintiffs were bound to keep up such a school on the premises as mentioned in the lease; that he had then inquired about it, and discovered that plaintiffs had, for some time previous to 1820, maintained and educated some girls, but whether the required number or not, he did not know; and that in 1820 they opened a day-school for girls; and that in 1832 they ceased to use the school-house at all, and in place of it, continued to receive a few girls in an out-house; and that in 1837 they set to a stranger, for farming purposes, the school-house and premises comprised in the original lease, reserving merely the out-house in which, since 1832, they continued to receive a few of the female children of the neighbours, which does not contain accommodation for twenty boys and twenty girls; and that they had thereby forfeited all right to a renewal.

That defendant did not attain his age until 1835, and never resided near the lands until 1838; and that he derived his title to them under the will of his father, who had purchased the lands, in 1804, from the representatives of Lord Newport, and had died in 1820.

With respect to the payments of rent, the answer stated, that one was made, during the defendant's minority, to the agent of the trustee, under his father's will, and without any application having been made for it, and for the express purpose of making a case of waiver; and that when the payments were made in 1836 and 1838, he was ignorant of the covenants contained in the lease.

It appeared, from the depositions in the cause, that up to 1820, upwards of forty girls had been educated and maintained upon the premises, and they were exclusively Protestant; that in 1820, the boarding-school was discontinued, the pupils then in the house were transferred to other schools of the Society, and a day-school was opened, which was attended, on an average, by nearly one hundred children of both sexes, and without any distinction of creed. Up to 1830, the day-school was kept in the old charter-house; but, in that year, the plaintiffs demised the house and land to a former schoolmaster

(Edward Dunne), who built a new school-house on the premises, which was proved to be sufficient to accommodate upwards of forty day-scholars, but not that number of boarders, and in which the school had ever since been kept. It appeared that, in 1832, Dunne, with the permission of plaintiffs, demised part of the charter-house to the military, as a barrack; but how long it had been used as such did not appear.

With respect to the payment of rent, it appeared to have been received in ignorance of the contents of the lease of 1747, and without any communication with, or authority from the defendant, save that the person who received it was in the habit of receiving the rents of other property of the defendant. The payments appeared to have been made on each occasion without any application on behalf of defendant.

One of the plaintiffs' witnesses, Edward Dunne, deposed, that he had a conversation with the defendant's father shortly before his death, upon the subject of the alteration of the school at Newport, and that he stated that it would be more advantageous to the neighbourhood to have it a day-school.

The reading of this deposition was objected to by defendant's Counsel, on the ground that it had not been sufficiently put in issue by the bill, and they relied on *Hall v. Maltby* (a); *Mulholland v. Hendrick* (b); and *Farrell v. ———* (c).

The Counsel for the plaintiffs contended, that the charge in the bill respecting Lord Newport, and those who derived under him, being aware of the alterations, was sufficient to entitle them to read it, and they cited *Hughes v. Garner* (d); and *Garrett v. Besborough* (e).

[The LORD CHANCELLOR permitted the deposition to be read subject to the objection, and stated that he would consider the authorities upon the subject, and if it appeared not to be sufficiently put in issue he would ultimately reject it.]

No evidence was given to shew whether the plaintiffs had ever maintained children of both sexes, or when the alteration in that respect took place.

As to the course of instruction pursued, one of the witnesses for the plaintiffs, who acted as master of the school, deposed that "the children were instructed in the English tongue, in the Protestant religion, in the Holy Scriptures, in writing and arithmetic;" while one of the witnesses for the defendant, a person residing in the neighbourhood of the school, deposed that "the children received instruction without any distinction as to religious creed."

Mr. *Blackburne*, Q. C., Mr. *Collins*, Q. C., and Mr. *Otoay*, for the plaintiffs.

No breach of the covenant has been committed by the plaintiffs, as

(a) 6 Price, 240.

(c) 1 Mol. 363.

(e) 2 Ir. Eq. Rep. 180.

(b) 1 Mol. 359.

(d) 2 Y. & C. 323.

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they were not bound to maintain the children. The only word in the lease from which such a liability is inferred is "reception;" but that does not of itself mean that the children were to be maintained, and the doctrine propounded by Lord Mansfield, in *Cook v. Booth* (a), that a covenant may be construed by the acts of the parties, has been long since overruled by the cases *Baynham v. Guy's Hospital* (b); *Eaton v. Lygon* (c), and *Iggulden v. May* (d). As long as the plaintiffs educate the requisite number of Protestant children, it is no matter of complaint that they educate Roman Catholics also. The alteration that took place in 1819, was rendered necessary by the change in the resources of the Society, consequent on the withdrawal of the parliamentary grant, and the cases in which the doctrine of *cy præs* has been acted on, and which will be found collected in *Shelford on Mortmain* (e), shew the length to which the Court has gone in substituting some other scheme for that which the donor contemplated, and we are willing, if the Court think it necessary, to have it referred to the Master to settle a scheme for managing this charity, according to the terms of the covenant. But even supposing this covenant to have been broken, the breach of it has been waived. The possession of the tenant is notice of every interest he claims in the land, and at the time defendant's father purchased these lands the Society had ceased to receive children of both sexes, and from the time of his purchase, he frequently resided near the school; and according to the evidence of the witness Dunne, if the Court shall ultimately think it admissible, he expressly approved of the change in the constitution of the school in 1819, and since his death we have paid rent to the persons who acted for the defendant. Now, even in the case of an agreement for a lease, an act which would be a breach of a covenant in the leases if granted, and a forfeiture of the leases is no objection to a specific performance of the agreement, if the lessor have done an act that amounts to a waiver of that forfeiture. *Gourlay v. Duke of Somerset* (f). The case is still stronger where performance of a covenant to renew is sought. There it has been held that breaches of covenant are not an objection to granting a renewal. *Trant v. Dwyer* (g); *Kennan v. White*. (h).

Mr. Pennefather, Q. C., Mr. Monahan, Q. C., and Mr. J. S. Townsend, for the defendant.

The lease in this case was not granted for a valuable consideration, but in order to effect a particular purpose, through the medium of plaintiffs, and they now seek to have the benefit of it in order to apply it to a totally different purpose. The object of Lord Newport, who was one

(a) 1 Cowp. 819.

(c) 3 Ves. 690.

(e) p. 692.

(g) 1 Dow. & Cl. 125.

(b) 3 Ves. 295.

(d) 9 Ves. 325; S. C. New Reports, 452.

(f) 1 Ves. & Be. 68.

(h) Lyne. Ap. 119.

of the original members of the society, was, that the children should be brought up Protestants, and in order to effect that, it was necessary that they should be boarded, and it is plain from the limited number who were to receive education, that the covenant to receive meant that they were to maintain as well as educate. That such was the meaning appears from the acts of the plaintiffs themselves, who built a house fit for the purpose, and maintained the requisite number of children, down to 1820. In cases of ancient deeds or charters usage is admissible to explain their meaning, *Weld v. Hornby* (a), and the same doctrine is laid down in 2 *Inst.* (b); *Attorney General v. Parker* (c); and was acted on by the Twelve Judges, in *The Queen v. The Lord Primate* (d). In the cases cited on the other side, the question was whether a covenant for renewal was perpetual or not, and are clearly distinguishable from the present. When the plaintiffs ceased to maintain the children, they ceased to perform the conditions on which the grant was made; the confining the education to children of one sex was a direct breach of the covenant, the donor contemplated a joint education, and the society has no right to get the benefit of his covenant for renewal when they do not carry his views into effect. The admission of Roman Catholics was another breach of the covenant. Lord Newport was one of the original members of the Society and knew the objects for which it was founded, and he granted this piece of land expressly for the promotion of those objects. Now, nothing can be more opposed to those objects than the education of Roman Catholics, as such, and it does not appear that any exclusive system of religious instruction is pursued. The power of making bye-laws must be exercised in such a manner that they shall not be inconsistent with the charter itself; *Attorney General v. Smithies* (e). The cases cited on the other side as to the doctrine of *cy près* have no application: in all of them the property was vested absolutely in the trustees of the charity, and the question was with the heir or next of kin of the donor. There is no case in which the Court has interfered with the rights of the landlord merely because a charity was concerned. Besides, before the doctrine of *cy près* can be resorted to, it must be shewn that it is impossible to carry into effect the original intentions of the donor; *Attorney General v. Lord Mansfield* (f). The defendant here has the legal estate; and what equity have the defendants, who have broken their own covenant in every respect, to restrain him from proceeding on it? If one of the lives were in being, and the defendant brought, an ejectment for a forfeiture by reason of the breach of covenant, the Court could not interfere. Relief will not be given in equity against the breach of any covenant,

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(a) 7 East, 195.

(b) p. 282.

(c) 3 Atk. 572.

(d) not yet reported.

(e) Cooper's Reports of Lord Brougham's decisions. 17. (f) 2 Russ. 514.

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but one for the payment of money; *Hill v. Berkeley* (a); *Bracebridge v. Buckley* (b); *Green v. Bridges* (c). The Court has no jurisdiction to direct a scheme for the management of this property in this suit; no such case is made by the bill, which treats this as an ordinary case between landlord and tenant. Nor can it in a suit for a renewal sanction the breaches which have been committed by the plaintiffs here, because it is a case of a charitable institution. No case of waiver of the forfeiture has been made out. The evidence of Dunne as to conversations with defendant's father, are inadmissible as they were not put in issue by the bill. The payment of rent was made for the very purpose of making out a case of waiver; they were made voluntarily without a demand, and the persons to whom they were paid had no authority to waive a forfeiture; *Doe v. Birch* (d). Besides, the breach here is a continuing breach, and the receipt of rent only waives existing forfeitures; *Doe v. Woodbridge* (e).

Mr. *Otway* in reply.—Of the two breaches of covenant relied on, viz., the not boarding the children and the educating Roman Catholics. —The lease is totally silent as to the first, with the exception of the word, "reception," and the circumstances of the time rebut the inference which has been drawn from the limited number of children, as to the meaning of that word. At the period when the lease was granted the population of the country was so thin, that forty was probably a larger number of children than could be got to attend a school of this description; and there was, as the charter itself recites, a great scarcity of schoolmasters, so that a considerable inducement would be requisite to induce one to settle in a remote district. The charter too is silent upon the subject of boarding. Then as to religion, so far from the education of Roman Catholics being opposed to the Charter with reference to which this lease was framed, it is in strict conformity with it. The great object of the founders of the Society, as expressed in the charter, is the education of Roman Catholics, and it is the duty of the Society to do that in such a manner as not to shock their religious feelings. The lease refers to the charter and must be considered as if the latter were incorporated in it. But if the Court should think that a breach of covenant has been committed, the defendant has waived that breach by acquiescence, and the condition of re-entry is gone in consequence, upon the principle of *Dumpor's case* (f). That doctrine was acted on in *Brummel v. M'Pherson* (g). The case of *Jones v. Jones* (h) shews that the Court will decree execution of an agreement where breaches

(a) 18 Ves. 62.

(c) T. & Sim. 96.

(e) 9 B. & C. 376.

(g) 14 Ves. 175

(b) 2 Price, 200.

(d) 1 Mee. & W. 40.

(f) 4 Rep. 119, b.

(h) 12 Ves.

of covenant have been committed, and will leave the lessor to his remedy at law. The circumstance that this is a charity case places us in a better position than an ordinary tenant. *Attorney-General v. Boulbee* (a); *Attorney General v. Green* (b).

THE LORD CHANCELLOR.

The bill in this case is filed by the Incorporated Society against Wellington Anderson Rose, for a renewal of a lease granted in 1747, by Lord Newport, under whom defendant derives, at a rent of five shillings yearly, which contained a covenant for perpetual renewal upon payment of a fine of five shillings for every life that should be added. That lease contained a covenant on the part of the Society to build one or more substantial house or houses on the demised premises, fit for the reception and education of twenty boys and twenty girls, to be nominated from time to time by the Society, according to the provisions of the charter by which they were incorporated. Then follows a proviso, that if the house were not built, and the twenty boys and twenty girls received and educated according to the true intent and meaning of the Society's charter, that then the lease should be void, and the landlord should be at liberty to re-enter. The defendant resists performance of the covenant for renewal, and insists that the plaintiffs have disentitled themselves to the benefit of it by reason of the breaches of this covenant. Now, this covenant, containing as it does an express reference to the Society's charter, must be governed by the true intent and meaning of that instrument. By that charter, the Society was empowered to make rules from time to time for the management and guidance of their schools, provided those rules were not repugnant to the laws then in force in Ireland, and provided also they were approved of by one of the Archbishops of Ireland, and by either the Lord Chief Justice, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron. No provision is contained in the charter, nor was any made by any subsequent regulations, for the reception into one house of an equal number of boys and girls, nor for their maintenance and education jointly. The Right Reverend and learned Personages to whom the control was entrusted, probably had very good reasons for not having the education of children of both sexes carried on under the same roof, and they may have thought that in certain states of the funds of the Society it would be advisable to establish a day school. Now, though the grant in this case was made for the reception and education of twenty boys and twenty girls, and the covenant by the Society was to erect and maintain a building fit for that purpose, yet as that covenant contains a reference to the charter, it must be qualified

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(a) 2 Ves. jun. 380.

(b) 2 B. C. C. 492.

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by the terms of that charter. The proviso making the lease void in case of non-performance of that covenant, must be construed in like manner as the covenant itself; and as the latter is controlled by the provisions of the charter, so must the former.

In this view of the case the evidence of Dunne becomes highly material, for that evidence goes to shew that the father of the defendant was informed of the intended departure from what had previously been the established practice respecting this school, and that when informed of it he expressed his approbation of the change. There is no allegation that the change was made without the concurrence of the high personages by whom the charter required that the rules should be approved of, and I must take it, therefore, that this change was made with their approbation.

As to the admission of Roman Catholic children into the schools, so far from that being a violation of the charter, it was not only not contrary to it, but it was considered by the framers of the charter as the very best means of promoting the ends for which the Society was incorporated. Whether they were right in so thinking, whether that is an effectual mode of effecting the objects contemplated by the founders of this Society, or whether there are other means more effectual, it is not for me to decide—I leave that to the decision of those personages who are better qualified to decide on such a subject than I am.

It is said that the evidence of Dunne is inadmissible because it is not put in issue by the bill, and the following passage in the bill has been relied on in support of its admissibility.

[Here his Lordship read the charge in the bill, stated *ante*, p. 261.]

In my opinion this evidence is properly receivable, and I see no reason for departing from the rule upon this subject which I laid down in *Garrett v. Besborough*, namely, that the reception or rejection of evidence of this description as to admissions not specifically put in issue, must be decided by the circumstances of each case, and that there is no general rule upon the subject fettering the discretion of the Court.

It is unnecessary to decide whether the acceptance of rent in this case is a waiver of the forfeiture. I must declare the plaintiffs, for the reasons I have stated, entitled to a renewal, and a proper deed for that purpose must be settled by the Master.

The Counsel for the plaintiff offered in the course of the argument, to consent that the Master in settling the terms of this renewal should prepare a scheme for the future management of this school; but considering the class of persons to whom the management of this school is entrusted, I do not think I ought to interfere with them. They are much better judges of such a subject than this Court can possibly be, and I shall leave it entirely to them. The plaintiffs must of course pay the expenses attendant upon the execution of the renewal, but the defendant must pay the costs of this suit.

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THE Rev. Godwin Swift, by his will dated the 5th of October 1817, duly executed and attested for passing freeholds, devised certain estates to Godwin Swift, and Robert Acland Whiteway, and the survivor and the heirs of such survivor, upon trust after payment of the costs and expenses attending the execution of his will, to pay his son Deane Swift an annuity of £400 for life, and after his decease, to pay the same for ever to such child or children, as he might have; and the testator declared, that in case the yearly rents of his said estates should not be sufficient to pay two annuities therein particularly mentioned, and to pay the annuity to Deane Swift, and also an annuity therein given to his wife Maria Swift, and his daughter-in-law, Jane Sophia Swift, that the said deficiency should be borne rateably by Maria Swift, Deane Swift, and Jane Sophia Swift, and that the said annuities should be reduced accordingly. Subject to the said annuities, the testator directed that the trustees should stand seized of the devised estates, to the use of the defendant Godwin Meade Swift for life, with remainder to his first and other sons in tail, and appointed Maria Swift and Godwin Swift executrix and executor.

An agreement for the payment of a personal annuity will be specifically performed, and the defendant decreed to pay it, on the ground that there is no adequate remedy at law.

The testator died on the 26th of December 1815, without having revoked or altered his will, which was shortly afterwards proved by Maria Swift, and Godwin Swift.

A deficiency arose in the payment of the annuities to Maria Swift, Jane Sophia Swift, and Deane Swift, during the years 1816, 1817, and 1818, in consequence of a portion of the rents which accrued due during those years, having been applied in payment of the costs of proving the testator's will, and of certain judgment debts of the testator; and Deane Swift, on the 26th January 1819, filed his bill against the trustees and the present defendant G. M. Swift, then a minor, for the purpose of having the arrears of the annuity raised out of the lands.

Godwin Swift answered the bill, denying that any thing was due on foot of the annuity; and before any further proceedings were had in the case, Deane Swift died on the 10th October 1823, having by his will (dated the 27th December 1817) given all his property, subject to his debts, to his wife (the present plaintiff), whom he appointed executrix, and without leaving any issue.

The property left by Deane Swift was very inconsiderable, and his widow did not prove the will upon his decease.

On the 12th August 1826, the defendant attained his age, and in 1827 he returned to Ireland, from the Continent, where he had until then re-

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sided; and it appeared by the evidence of Godwin Swift, who was at that time the law agent of the defendant, that a claim was made by plaintiff for the arrears for which Deane Swift had filed his bill, and that he consulted Counsel (the present Baron Richards) upon the validity of the plaintiff's claim, and that the opinion of Counsel was that the claim was valid to some extent: whereupon, for the purpose of putting an end to litigation, the defendant agreed to compromise the matter, and in lieu of all demands to give the plaintiff an annuity of £40 for her life, she releasing defendant and the lands devised to him from all further claim; that in order to enable plaintiff to do so she proved the will of her husband; and that upon the occasion of the compromise, he (G. Swift) prepared a deed of release. That deed was dated the 14th of January 1828, and purported to be made between the plaintiff of the first part, G. Swift, and R. A. Whiteway of the second part, and the defendant, of the third part. It recited the will of the Rev. G. Swift; the deficiency in the payment of the annuity to Deane Swift; his filing a bill to raise the amount of the arrear; his will and death; the proof of his will by plaintiff; and that defendant had required the plaintiff to release him, and the trustees and the devised estates from all claims on foot of the annuity, which she had agreed to do, and in consideration of such release, he had agreed to give her an annuity of £40 for life, and in execution of the agreement plaintiff released the lands, and the trustees of the testator's will, and the defendant, from all claim on foot of the said annuity.

The deed contained a covenant for further assurance on the part of the plaintiff, by whom alone it was executed, and a memorial of it was registered on the 1st of July 1828. On the same day that the deed of release bore date, the defendant wrote a letter to the plaintiff in the words following:—

“Dublin, 14th January 1828.

“My Dear Aunt,—Considering that you have given me and the property “mentioned in the will of my grandfather, a general release from all claims “and demands which you might have on foot of the annuity of £400, given “to my uncle Deane, I have agreed to give you an annuity of £40 a year, “to commence from the 1st of November last. For this, you will apply to “Mr. G. Swift, to whom I have given the necessary instructions to pay it “to you quarterly; should any thing happen to me, I have every reliance “that my brothers will continue this payment to you.

“Believe me yours sincerely,

“GODWIN MEADE SWIFT.

“Mrs. Deane Swift, Baldogee.”

On the 8th of July 1828, the defendant wrote to G. Swift, who was then his land agent, directing him to pay the annuity to plaintiff “out of the rents.”

The annuity was regularly paid by G. Swift out of the defendant's

rents, in pursuance of that direction until 1836, when defendant removed G. Swift from his agency ; and after the removal of G. Swift, it was paid up to November 1839, from which time no further payment was made ; and on the 1st of May 1840, the plaintiff filed the present bill, stating the agreement which had been entered into between her and the defendant, as the same was recited in the deed of release ; and stating that immediately after the execution of the said deed, the defendant addressed a letter to plaintiff, in which he distinctly stated the terms of the agreement, and assured plaintiff that he would perform same, but that as plaintiff had mislaid the letter she was unable to state the contents of it more particularly, but no reference was made to defendant's letter of the 8th of July 1828, to G. Swift. The bill prayed that defendant might be decreed specifically to perform his said agreement to pay plaintiff the said annuity of £40, and that an account might be taken of what was due on foot of it, "and that defendant might be compelled by the decree of the Court "to pay the same to the plaintiff."

The defendant by his answer denied that there was any thing due to Deane Swift, on foot of the annuity of £400, at the time of his death, or that he ever recognised the validity of plaintiff's claim, as his personal representative, or that he ever entered into any agreement with her respecting it, or sanctioned the execution of any release by plaintiff, or that he ever wrote any such letter as that referred to in the bill ; but stated that representations were made to him shortly after his return to Ireland, of the distressed situation of the plaintiff, and that he, from motives of kindness promised to allow her £40 a-year for her life, which he paid her until 1839, when he considered she no longer wanted ; and that G. Swift asked him to bind himself by deed to pay the annuity, which he refused, but wrote to Godwin Swift a letter authorising him to allow plaintiff the said annuity, and that he would give credit for it in the account ; and that when G. Swift advised him to get a release from plaintiff he distinctly refused, lest he might seem thereby to recognise the validity of plaintiff's claim ; and that he never heard of the existence of the deed of release until 1839, when he was informed that G. Swift had actually procured a release to be executed by plaintiff.

Mr. *W. Brooke*, Q. C., Mr. *Blake*, Q. C., and Mr. *A. J. Maley*, for the plaintiff.

The Court exercises a peculiar jurisdiction in annuity cases, and the doctrine of Sir J. Leach, in *Bensley v. Burdon* (a), that the Court will not interfere where the annuitant has a remedy at Law, has been repudiated by the Courts of Equity in this country, in the cases of *Fay v. Fay* (b), *Ahearns v. O'Callaghan* (c), *Manley v. Hawkins* (d),

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(a) 2 Sim. & Stu. 519.

(b) 2 Jones, 250.

(c) 5 Law Rec. N. S. 198.

(d) 1 D. & W. 363.

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Stevelly v. Murphy (a); and if this be an annuity charged on land, the right of the plaintiff to relief in Equity cannot now be questioned. Now, the defendant, in his letter of the 12th January to the plaintiff, states that he has given directions to Godwin Swift to pay her the annuity; so that he has thereby incorporated the directions given to G. Swift with his letter to plaintiff. Upon referring to the letter containing those instructions, it will be seen that he directs the annuity to be paid out of the rents of his estate; and moreover, in his letter to plaintiff, he expresses his confidence that if any thing happened him, his brothers would continue to pay it. At that time he was unmarried, and his brothers were next in remainder to the estates, of which he was but tenant for life; manifestly contemplating a payment out of the produce of those estates. It is true, we do not make this case by our bill, which treats this as a mere personal annuity; but the Court will not bind a party by an erroneous admission of a consequence of law in his pleading, *Edwards v. Jones* (b); *Steele v. Mitchell* (c); *Pierce v. Grove* (d); *Cuthbert v. Creasy* (e). The prayer for general relief is sufficient to entitle us to the benefit of this; *Cooke v. Martin* (f); *Wilkinson v. Beale* (g). But even treating this as a mere personal contract, we are entitled to the relief prayed. In *Newman v. Auley* (h), a bill was brought for the arrears of an annuity secured by bond, and the Court directed an account and payment of the arrears. In *Cooke v. Wiggins* (i), where a bond was given to a trustee for a married woman, on her separation from her husband, to secure an annuity, Sir W. Grant directed payment of the arrears and of the growing payments. As to our having a remedy at Law, it is very doubtful whether we could maintain any action at Law upon this letter, which, not being under seal, would require to be supported by the allegation and proof of a sufficient legal consideration; and for that we could not go out of the document itself, as it is a contract within the Statute of Frauds. Now, on the document itself, it is at least doubtful, whether a Court of Law would hold that there was a sufficient consideration for the promise. The Master of the Rolls, in his judgment in *Stevelly v. Murphy*, states, as one of the grounds for giving relief, the difficulty which the plaintiff would have in proceeding at Law. Here we were entitled to come into Court for a discovery from the defendant. The letter, which is itself but evidence of the contract, was mislaid when the bill was filed; and if any part of the relief which plaintiff seeks can only be got in Equity, he is entitled to come here for general

(a) 2 Ir. Eq. Rep. 448.

(c) 3 Ir. Eq. Rep. 1.

(e) 6 Mad. 189.

(g) 4 Mad. 408.

(b) My. & Cr. 236.

(d) 3 Atk. 523.

(f) 2 Atk. 2.

(h) 3 Atk. 579.

(i) 10 Ves. 190.

relief. *French v. Morgan* (a). At Law, we should be obliged to bring an action for every gale of the annuity—a course of proceeding inconvenient to the plaintiff and harrassing to the defendant—or we should take damages for the entire value of the annuity, to be ascertained by a jury, who would not have any elements to enable them to estimate the value of an annuity depending on the joint lives of plaintiff and defendant.

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Mr. Warren, Q. C., Mr. Brewster, Q. C., and Mr. J. S. Townsend, for the defendant.

This contract was entered into by defendant shortly after he came of age, upon his return to Ireland; and he was under the impression that he had never given any sanction to the release, and that the annuity was merely a voluntary payment, which he was at liberty to discontinue when he pleased. The plaintiff confirmed him in this belief, by stating in her bill that the letter was mislaid, and induced the defendant to deny it in his answer. It must be admitted now that he was mistaken in that belief. Still the plaintiff has made no case to entitle her to relief in this Court. The defendant's letter to G. Swift is merely a direction to his agent, out of what fund the payments were to be made, and does not constitute a charge on land. The plaintiff has, in her bill, treated it as a personal contract, and cannot now convert it into a charge on land. The letter to G. Swift was not in issue in the cause, while, in the cases cited on the other side, the facts were all ascertained, and the only question was, the consequence of Law resulting from them. Taking this as a mere personal contract, the Court will not interfere, but leave the plaintiff to her remedy at Law. *Mitford on Pleading* (b). It is only where the legal remedy is inadequate or defective, that a Court of Equity will interfere. *Flint v. Brandon* (c); *Hill v. Barclay* (d). In the former case, Sir W. Grant refused specific performance of a covenant to lay down a gravel pit, on the ground that there was a remedy at Law. The case of *Brough v. Oddie* (e) is precisely in point. There, the defendant undertook to pay an annuity to the plaintiff, in case certain other parties failed in performing an engagement entered into with her. The event happened, and she brought her bill for a specific performance of the agreement; but Sir J. Leach, M. R., dismissed the bill, saying, "That admitting the event to have happened on which the payment was to be made, the remedy of the plaintiff was by action at Law. That the plaintiff has a remedy at Law, appears from the case of *Gibson v. Dickie* (f), which was an action of assumpsit for an annuity.

(a) 2 Mol. 488.

(c) 8 Ves. 162.

(e) 1 Russ. and My. 55.

(b) p. 119.

(d) 16 Ves. 405.

(f) Ma. & Sel. 463.

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In *Newman v. Auley* (a), the obligor in the bond had devised his estates to "the defendant," charged with the payment of his debts. In *Cooke v. Wiggins* (b) the trustee refused to put the bond in suit.

Mr. *Maley*, in reply.—The contract entered into by the plaintiff was such as to have rendered her liable to this Court for the performance of it. The plaintiff might have filed his bill to have his estate cleared from the encumbrance; and the Court would have compelled the plaintiff to have executed the release. Now, the remedy for vendor and purchaser must be mutual: where there are mutual covenants, there must be mutual remedies. *Lewis v. Lechmere* (c). In *Ball v. Coggs* (d), an agreement, by the owner of certain brass works, to give the plaintiff, who had invented improvements in the manufacture, an annuity for his life, and 3s. 6d. per ton for every ton of brass wire made by them, was specifically performed. In *Withy v. Cottle* (e), a bill by the vendor of an annuity charged on stock, for specific performance of the agreement was demurred to; but Sir J. Leach overruled the demurrer, saying, "The remedy here must be mutual for vendor and purchaser. In *Adderly v. Dixon* (f), the plaintiff, who had purchased and taken assignments of certain debts proved under a commission of bankrupt, agreed to sell them to defendant, and executed an assignment, and signed a receipt for the purchase-money, although it was not, in fact, paid: the bill was brought merely for the payment of the purchase-money. The defendant objected that there was no ground for the interference of Equity; but Sir J. Leach overruled the objection, on the ground that the purchaser might have filed a bill for specific performance, and "that "when a bill will lie for the purchaser it will for the vendor."

Mr. *Warren*, Q. C., having, at the close of Mr. *Maley's* argument, commented on the authorities cited by him,

The LORD CHANCELLOR directed the case to be spoken to by one Counsel for the plaintiff: and accordingly,

Mr. *W. Brooke*, Q. C., for the plaintiff, contended that the doctrine, that Courts of Equity will not decree specific performance of personal contracts, originated in the unwillingness of the Judges of that time to interfere in contracts respecting South Sea Stock. That the first and leading case on the subject—*Cudd v. Rutter* (g)—was a contract of that description; and that from the report of that case before Parker, C. (h),

(a) *Ante*.

(c) 10 Mod. 505.

(e) 1 Sim. & Stu. 174.

(g) *Ib.* 607

(b) *Ante*.

(d) 1 B. P. C. 140.

(f) 1 P. Wms. 1.

(h) 5 Vin. Ab. 538.

it appeared that the judgment rested not only on the existence of a remedy at law, but on the circumstance of the thing sold not having been in the vendor's possession, and on the fluctuations of the stock. That the doctrine in that case was acted on only in cases precisely similar; and and that the Courts were constantly struggling to escape from the rule there laid down, by establishing successive distinctions; and in addition to the cases cited by Mr. *Maley*, he referred on this point to *Colt v. Netterville* (a); *Buxton v. Lyster* (b); *Nuthbrown v. Thornton* (c); *Doloret v. Rothschild* (d); *Lynn v. Chaters* (e); *Kenny Wrexham* (f).

Mr. *Brooke* also argued that there was no remedy for the plaintiff at Law, as an annuity lies in grant; and no such thing as an annuity created by *parol* is known to the law; and in support of this position, referred to *Blackstone's Commentaries* (g); *Comyn's Digest* (h); *In re Samuel Lock* (i).

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The LORD CHANCELLOR this day delivered the following judgment: [After stating the prayer of the bill, the will of the Rev. G. Swift, the suit by Deane Swift, and the question in that suit]—

Feb. 9.

Such was the state of things when Deane Swift died. The bill had not been effectually proceeded on; nor, on the other hand, had it been dismissed; the suit was still subsisting at the death of Deane Swift. It appears from the evidence of Godwin Swift, who was then the agent and trustee of the defendant, that the defendant had consulted him upon the subject of that claim, so that he had distinct knowledge of its existence; and from the same evidence, it appears that a case was submitted to Counsel on his behalf respecting it; and the eminent Counsel whom he consulted gave it as his opinion, that the claim was well founded to a certain extent.

The evidence of Godwin Swift further shews, that a compromise took place between the plaintiff and the defendant; and that an agreement was entered into by the defendant, to grant an annuity of £40 to his aunt during their joint lives, in consideration of her relinquishing that claim. Now, whether that claim was valid or not, is perfectly immaterial. There was a claim subsisting, and a suit had been instituted for enforcing it; and whether it would have been ultimately established, or not, is perfectly immaterial in the consideration of the present case. That claim the plaintiff was entitled to in right of her deceased husband; and to enable her to release it effectually, it was necessary that she should prove her

(a) 2 P. Wms. 304.

(b) 3 Atk. 383.

(c) 10 Ves. 161.

(d) 1 Sim. & Stu. 490.

(e) 2 Keene, 521.

(f) 6 Mad. 355.

(g) Vol. 2, p. 40.

(h) Tit. Annuity, A.

(i) 3 Dow. & Ry. 603.

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husband's will. She did prove the will accordingly on the 8th of January 1828 ; and on the 12th of January she executed the release, and, at the same time, the letter to her was written by the defendant.

That letter is in the following terms :—

[Here his Lordship read the letter.]

These are the terms of the undertaking on which the bill is founded ; and in addition to this, a second letter was written by the defendant on the 8th of July 1828, to Godwin Swift, in whose possession these documents appear to have continued. The second letter has been relied on as making this annuity a charge on the land ; and if it had done so, it would have concluded all question growing out of the existence of a remedy at Law ; because, whenever an annuity is charged on land, I consider it perfectly settled, that the party is entitled to come into a Court of Equity for that which is the appropriate relief in such a case, namely, the appointment of a receiver. This relief is not prayed by the bill, nor is the letter put in issue—it comes out upon the evidence of Godwin Swift ; but even if it were, it could not be considered as a grant of a rent-charge. That letter is merely intended as a direction to his agent, to be used for arranging their accounts in any settlement between them. The only way in which it is material is to shew that the defendant was aware of the annuity, and approved of the arrangement that had been made by G. Swift with the plaintiff. The annuity was paid up to November 1836, when the defendant settled accounts with G. Swift, and after that it continued to be paid until 1838. It is admitted that there was an arrear of four quarters due when the bill was filed.

To this bill several defences have been set up. The first is a denial that the release had been ever executed by the plaintiff. The second is a denial that any compromise ever took place between the plaintiff and defendant. The third is a denial of the letter of the 12th January. The fourth is a denial that any thing could have been due on foot of the annuity devised to Deane Swift. The fifth is, that any annuity granted by the defendant was merely eleemosynary, and was given merely as a bounty to his relative, on account of her extreme poverty. In every one of those defences the defendant has totally failed—every one of them has been totally disproved ; and now, at the hearing of the cause, the defence is, that the agreement was a mere personal contract, and cannot be enforced in Equity. The defendant seeks to be excused from the consequences of his unfounded defence, on the ground that he was mistaken as to the facts, and misled into a denial of the transaction by the statement in the bill, that the letter was mislaid. It is said that this was done with a design to entrap the defendant to contradict, in his answer, the statements in the bill ; and I am called on to believe, that the advisers of this aged and penniless lady have deliberately stated this in the

bill, in order to lay a snare for the defendant, and make him believe that the facts stated had no existence. I should be glad that the defendant's denial in this case arose from want of memory; but I cannot view that allegation as any ground for not visiting upon him the costs of a defence which is not only unproved, but is actually disproved in every point; and which, if not unrighteous, is, to say the least of it, most rash and ill considered.

If, however, the contract between the parties be such, that adequate relief at Law can be obtained, as has been contended for by the Counsel for the defendant, I am bound to dismiss the bill. To their arguments I have given the greatest attention, and I have directed the case to be argued a second time, in order to give it the fullest consideration, and I have anxiously considered the case upon this point, lest, in my anxiety to give relief to the plaintiff, I may infringe upon the established principles of this Court. After thus giving to the case the fullest consideration that I am capable of, I have fully satisfied myself, that in doing justice to the plaintiff, I am not departing from the settled rules of Equity, or opposing any of the principles upon which the Court acts. A number of cases have been cited on both sides, and the result of them all is, not that wherever there is a remedy at Law, relief will be refused in Equity; but that when the relief at Law is equally beneficial and equally effectual with that which may be obtained in Equity, there the Court will refuse to interfere. Upon that ground where an annuity is charged on land, although there is a remedy at Law, yet as a Court of Equity alone can give the appropriate relief, by the appointment of a receiver, a bill for that purpose will be entertained. As to the cases upon personal contracts which have been cited in the course of the discussion, the one which appears to me to approach nearest the present in its circumstances, is the case of *Brough v. Oddie*. That, however, is clearly distinguishable from the present. The object of the bill there was to have an indemnity against a liability that had been incurred upon the guarantee of the defendant, and the observation of Sir J. Leach was, that "a personal contract was not an indemnity in the proper sense of that word," and that he knew of no case in which, where the contract had created a personal obligation the Court had ordered a party to give security for its performance. Now, whether that doctrine is sound or not, it is not necessary for me to decide. It is sufficient to say such is not the present case; the plaintiff here seeks not an indemnity against any contract she entered into, she seeks the performance of a personal contract entered into with her by the defendant, and the relief which she seeks is that which can be afforded her only in a Court of Equity, namely, the performance of that contract in its very terms by the defendant.

It is said she has a complete remedy at Law for the breach of this contract, and that, therefore, this Court should not interfere. Now, the remedy at Law could only be obtained in one of two ways, either by at once recovering

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damages for all the breaches that might occur during the joint lives of herself and the defendant, or by bringing four actions in each year, and recovering in each the amount of a quarterly payment of the annuity. Those are the two modes of redress open to the plaintiff at Law. And I am called on to refuse relief here on the ground that such remedies are equally beneficial and effectual for the plaintiff as that which this Court could afford. To refuse relief on such a ground would not, in my opinion, be a rational administration of justice. I do not see that there is any authority for refusing relief, and certainly there is no foundation in reason for doing so.

The case of *Adderley v. Dixon* is a clear authority for this view of the case, and the reasoning of Sir J. Leach is precisely applicable to the present case, and particularly as to the latter alternative of the remedy at Law which the plaintiff possesses, namely, recovering by successive actions the amount of the successive gales of the annuity.—“Courts of “Equity,” says Sir J. Leach in his judgment in that case, “decree “specific performance of contracts not on any distinction between realty “and personalty, but because damages at Law may not afford a complete “remedy. A Court of Equity will not in general decree performance of “a contract for the sale of stock or goods, not because of their personal “nature, but because damages at Law are as complete a remedy to the “purchaser as the delivery of the stock or goods contracted for.” So that even as to stock Sir J. Leach does not lay it down that the Court will in all cases refuse a specific performance: then he proceeds, “The present “case being a contract for the sale of the uncertain dividends which may “become payable upon the estate of the bankrupt, upon the principle of “*Ball v. Coggs*, and *Taylor v. Neville*, a Court of Equity will decree “specific performance, because damages at Law cannot adequately repre- “sent the value of future dividends.”

Applying this to the present case, leaving the plaintiff to proceed at Law and to get damages at once for all the breaches that might occur during the joint lives of her and the defendant, would, in effect, be altering the entire nature of the contract that she entered into: it would be compelling her to accept a certain sum, a sum to be ascertained by the conjecture of a jury as to what was the value of the annuity. This would be most unreasonable and unjust: her contract was for the periodical payment of certain sums during an uncertain period; she was entitled to a certain sum of money, and she agreed to give up that for an annuity for her own and the defendant's lives, and to insist on her now accepting a certain sum of money in the shape of damages for it, would be in effect to make her convert into money, what she, having in money, exchanged for an annuity. As to her resorting four times every year to a Court of Law for each quarterly payment of this annuity, it is a manifest absurdity to call that a beneficial or effectual remedy for the plaintiff; and resting

the case on that ground alone, I think I am warranted by the highest authority in granting the relief sought. In *Colt v. Netterville* (a), the bill sought specific performance of an agreement to transfer stock at a certain price, and the defendant demurred on the ground that the plaintiff had a remedy at Law—but Lord King (no mean authority) overruled the demurrer, because circumstances might appear at the hearing which might make it just to compel the defendant to perform his agreement. So that this decision goes to shew that such a bill may be entertained, and that it will depend on the special circumstances of the case whether the Court will give or refuse relief. From the reference to this case by Lord Hardwicke in *Buxton v. Lyster* (b), it appears that the cause was heard and a specific performance decreed. The case of *Taylor v. Neville* which is stated by Lord Hardwicke in his judgment in *Buxton v. Lyster*, very much resembles the present; Lord Hardwicke's statement of it is, that the bill was filed for the performance of articles of agreement for the sale of 800 tons of Iron, to be paid for by instalments in a certain number of years, and that a specific performance was decreed. The case is cited by him with approbation, and he approves of the decision because the contract was a continuing one. In the case then before him (*Buxton v. Lyster*) the bill was filed for the execution of an agreement for the sale of timber then growing, for a sum of money to be paid by instalments in six years, and Lord Hardwicke decreed a specific performance because it was a continuing contract. "Such contracts," says he, "differ from those that are immediately to be executed"—grounding his opinion of the reasons for decreeing specific performance upon the fact that the money was payable by instalments. The present case is stronger than either of those, because the contract in each of those was for payment of a certain sum of money, by instalments it is true, but still of an ascertained defined sum; whereas here the contract is for the payment by instalments of a sum, the amount of which it is impossible to ascertain, depending as it does upon the continuance of the lives of the plaintiff and of the defendant. I am warranted, therefore, by the high authority of Lord Hardwicke, in saying that the circumstance that the contract between the parties is to have continuance during the joint lives of the plaintiff and the defendant, is sufficient to authorise me to entertain a bill for its performance in specie. Such a jurisdiction Lord Hardwicke says ought to be exercised with great caution in cases of personal chattels—an observation in which I fully concur, but the present appears to me to be a case calling for its exercise.

Ball v. Coggs is a decision to the same effect as those I have already referred to, and that decision rests not merely upon the authority of Lord Cowper, who pronounced the decree, but on the authority of the

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House of Lords, before whom the case was brought by appeal. The plaintiff there, not satisfied with the relief which Lord Cowper had given him, appealed against the decree, and the House of Lords varied the decree, by directing the defendant to pay the sums due for the brass wire, leaving the part relating to the annuity untouched.

There are many other circumstances in the case on which the plaintiff's right to relief might be rested. There is the fact that the deed of release was in the possession of Godwin Swift, and not in the plaintiff's. There is the difficulty of her recovering at all at Law, arising out of the want of consideration for this annuity in the letter promising to pay it, and there are, perhaps, other difficulties in the way of her proceeding at Law. But I do not think it necessary to go into them particularly, or to rest my decree on any other ground than that I have already stated; and I feel great satisfaction in being enabled by the authorities to overrule a most unrighteous defence, in which the defendant endeavours to convert into bounty what was clearly a matter of contract, and relies on the poverty of an aged lady as sustaining that case. That defence I overrule with costs, and with costs as between solicitor and client; and the decree which I shall make is, that the defendant do pay to the plaintiff the arrears already due, and the costs of this suit as between solicitor and client, and that he do pay the accruing gales from time to time as they shall become due, and that the bill be retained with liberty for the plaintiff to apply to the Court from time to time.

Declare that the plaintiff is entitled to a specific performance of the agreement in the pleadings mentioned, and accordingly let the defendant forthwith pay to the plaintiff the sum of £50 in discharge and satisfaction of the arrears due on foot of the annuity of £40 in the pleadings also mentioned, up to and for the 1st of February instant, together with the costs incurred by the plaintiff in this cause as between solicitor and client, and refer it to the Master to tax the same, and let the defendant continue to pay the plaintiff during her life the annual sum of £40 by four equal quarterly payments on the 1st of May, 1st of August, 1st of November, and 1st of February, in every year; and in case default be made by the defendant in the payment of any of the said quarterly payments, let the plaintiff be at liberty to enforce the payment thereof by the process of this Court.

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By deeds of lease and release, bearing date the 21st and 22nd days of April 1774, being the settlement executed previous to and in contemplation of the marriage of John Roberts with Martha Putland, the lands of Shanganah (amongst others) were conveyed to George Putland and William Percival, their heirs and assigns, to the use (after the marriage) of John Roberts for life; with remainder to the use of trustees to preserve contingent remainders; with remainder (subject to a jointure thereby provided for Martha Putland, and to certain terms for years) to the use of the first and other sons of the marriage in tail male; with remainder to the use of all and every the daughters of the marriage, to be equally divided amongst them as tenants in common, in tail general; with remainders over. The settlement contained a power enabling John Roberts, during his life, to demise or lease the lands of Shanganah for any term of lives or years, with or without covenants of renewal for ever; punishable or dispunishable of waste; and either in possession or reversion, remainder or expectancy; and to accept or take a fine or fines for such lease or leases, at rents not less than two-thirds of the value at the time of setting, and with proper clauses of distress, re-entry, and for payment of the rents to be reserved.

The marriage was afterwards solemnised; and John Roberts, by deeds of lease and release, bearing date the 25th and 26th of February 1793, and made between himself of the one part, and Edward Kent of the other part, demised and released unto Edward Kent and his heirs part of the lands of Shanganah, containing 42A. 1R. 8P., to hold for the term of three lives renewable for ever, at the yearly rent of £116. 6s. 5d., payable half-yearly, and the sum of ten shillings as a renewal fine on the fall of each life: and by a second indenture of release, bearing equal date with the former, and made between the same parties, John Roberts demised to Edward Kent and his heirs other part of the lands of Shanganah, containing 35A. 2R. 35P., for the term of the three lives named in the lease of equal date, with a covenant for

A landlord brought an ejectment for non-payment of rent against his tenant, and a mortgagee of the tenant's interest; and having recovered judgment, executed his *habere*. The tenant did not redeem the lands within six months after the execution of the *habere*; but after the expiration of that period, and within the nine months allowed the mortgagee to redeem, the latter informed the landlord that he was ready to redeem the premises, and to pay him the rent and costs. The landlord dispensed with a tender of the rent and costs being made to him; but in order to prevent a redemption of the premises, by the mortgagee, entered into an agreement with him, within the period of the nine

months, to pay him the sum due to him on foot of the mortgage, and take an assignment thereof, and to release him from the arrears of the rent, to the payment of which he was legally liable. That agreement was carried into execution by a deed of assignment bearing date within the period of the nine months, although actually executed after their expiration. The landlord subsequently sued the tenant for the arrears of the rent, and for the mortgage debt.—*Held*, on a bill filed by the tenant after the expiration of the nine months, that he was entitled to redeem the premises.

An admission in the answer, that the defendant's solicitor wrote a letter "to some such effect as that in bill stated; but for certainty as to the contents thereof the defendant begs leave to refer thereto when produced and proved," does not authorise the plaintiff to read the passage in the bill referred to, in order to shew what were the contents of that letter.

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perpetual renewal thereof, at the yearly rent of £98. 4s. 6d., and ten shillings as a renewal fine on the fall of each life. Both of these leases were duly registered.

On the 25th of June 1796, Edward Kent granted and released, by way of mortgage, the lands comprised in the two leases of 1793, to John Scott and his heirs, to hold the same from thenceforth for and during the lives in the original leases mentioned, and such other lives as should be added thereto respectively by virtue of the covenants for renewal therein respectively contained, subject to the payment of the yearly rents, and to redemption upon payment of the sum of £600, with interest: and at the same time he executed unto J. Scott his bond, with warrant of attorney for confessing judgment thereon, in the penal sum of £1200. The mortgage deed was duly registered. J. Scott afterwards, by deed of the 16th of February 1805, assigned the mortgage to Thomas Needham: and Thomas Needham died in 1806, having by his last will appointed his eldest son and heir-at-law Thomas Richard Needham his executor and residuary legatee.

Edward Kent expended large sums of money in building upon and improving the demised premises. This he did with the knowledge of Mr. Roberts, whose place of residence was near to the lands of Shangannah. In a few years after the demise to him, he became irregular in the payment of his rents; and on two occasions, Mr. Roberts was obliged to bring ejectments against him for non-payment of rent. The last gale of rent he paid was that which accrued due the 25th of March 1808; and in answer to the applications made to him by Mr. Roberts for the rent that subsequently accrued due, he represented to him that he had a suit pending in the Court of Chancery, in which he expected speedily to realise a considerable sum of money, and assured him that from that resource the rents should be discharged: and Mr. Roberts, relying on such representations and assurances, and wishing to accommodate Mr. Kent, did forbear for a considerable time to take proceedings to enforce payment of the rent. Edward Kent some time afterwards obtained a decree for the payment of a sum of about £3300 in that suit; but the sale of the lands which were subject to that charge was delayed, in consequence of an appeal to the House of Lords in another suit, which affected the lands decreed to be sold.

Mr. Roberts from time to time applied for the rent due to him, but was put off by the lessee, who represented that the suit in Chancery would speedily be determined. At length, in the Vacation after Trinity Term 1818, there being then ten and a-half years' rent due, he caused Edward Kent and Thomas R. Needham, the assignee of the mortgage, to be served with ejectments for non-payment of rent, to evict the two leases of 1793. These ejectments were brought on the sole demise of John Roberts. E. Kent alone took defence; and in Michael-

mas Term 1818, gave consents for judgments in both actions, with stay of execution until the following Hilary Term. Judgments were accordingly entered up; and on the 16th of February 1819, Mr. Roberts was put into possession of the lands comprised in the two leases of 1793, under two several writs of *habere*. He refused to demise them to Mr. Kent for the six months pending redemption; but put a steward of his own into the gate-house, and locked all the gates. He, however, informed Mr. Kent, that any person desirous of becoming a purchaser of his interest in the lands, might view the premises upon application to his steward.

The rent was not paid, nor was any bill for a redemption filed by Edward Kent within six months after the execution of the *haberes*: but it was admitted by the answer of Mr. Roberts to the original bill in this cause, that before the expiration of the nine months allowed by the statutes to the mortgagee to redeem, Edward Kent applied to Thomas R. Needham, the mortgagee, to advance money to redeem the lands, which the latter consented to do; and that all things were so arranged between Mr. Needham and Mr. Kent, that Mr. Needham was ready to redeem said lands; that Mr. Kent, after the expiration of the six months, from the execution of the *habere*, wrote to him (Mr. Roberts), informing him that the amount of the rent and costs due to him was ready to be paid, and requesting him to furnish the particulars of the amount; and also, about the same time, which was not long before the expiration of the nine months, applied to Mr. Maddock, his solicitor, to the same effect. Mr. Roberts further admitted that Mr. Kent did, in a very earnest manner, after his time for redeeming had expired, request him (Mr. Roberts) to accept of the rent and costs, and not (as he expressed it) to ruin him and his numerous family; that during the same period a second similar request was made of him by Mr. Kent, in the office of Mr. Maddock; that the Protestant Clergyman of the parish wherein he then resided waited on him at the request of Mr. Kent, with a message that the rent and costs were ready to be paid to him, and to request that he would accept of same; and that Mr. Hogan, the solicitor of Mr. Needham, on the part of Mr. Needham, made a similar written application to him about the same time. In another passage of his answer, Mr. Roberts admitted that Mr. Hogan, on the part of Mr. Needham, some time before the nine months allowed the mortgagee for redemption had expired, wrote to him (Mr. Roberts), and applied verbally to his law agent, to be informed of the amount due for rent and costs, and stated that Mr. Needham was ready to pay the amount: that he received two applications from Mr. Hogan; to the first of which he did not return any answer, wishing that whatever answer was necessary should be given by his solicitor; and that at the time when he received Mr. Hogan's second letter, his solicitor was in England, and he did himself answer the same, but did not answer Mr. Kent's letter on the same subject: and he

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admitted that he did not furnish any account, having, at the time he received Mr. Hogan's last letter, made up his mind to pay Mr. Needham the sum due to him on foot of his mortgage, and not to accept of the rent and costs unless he should be advised to the contrary: that before he received Mr. Hogan's last letter, he had instructed his solicitor, Mr. Maddock, to inquire from Mr. Hogan how much was due to Mr. Needham on foot of his mortgage, and whether he was ready to accept same; and that he was informed by Mr. Maddock, which he believed to be true, that on the 18th of October 1819—being nearly one month before the expiration of the nine months, and not many days after he had first received intimation of Mr. Needham's intention to redeem—Mr. Maddock waited on Mr. Hogan, and made the before-mentioned inquiries; and that Mr. Hogan, in answer, stated that the sum due was about £1000; but that he could not then answer whether Mr. Needham would accept of it and forego his right of redeeming his premises; and that on the 20th of October 1819, Mr. Maddock attended on Mr. Hogan and Mr. Needham, and inquired from them whether Mr. Needham was ready to accept of his mortgage debt; but that Mr. Needham declined to give any answer thereto until a direct offer should be made to him to pay him the same: and he (Mr. Roberts) expressly admitted that Mr. Needham, or Mr. Hogan on his behalf, was ready to pay the rent and costs. That finding Mr. Needham so cautious in his conduct in regard to giving an answer to his inquiries, he (Mr. Roberts), on the 23rd of October, directed his solicitor to take the advice of Counsel for his guidance: but that Mr. Maddock informed him that he was under the necessity of sailing that night for England, and that he could not do any thing in the business until his return, which would be in about ten days; but that before his departure he would make Mr. Hogan acquainted therewith, and that matters must remain as they were until his return; which he accordingly did: that he returned on the 1st of November; and that it was during his absence that he (Mr. Roberts) received Mr. Hogan's second letter, which he answered by stating the absence of Mr. Maddock, and that as soon as he returned, he (Mr. Roberts) would give his final answer, whether he would pay Mr. Needham or receive the rent and costs.

About the 9th November 1819, it was arranged between Mr. Roberts and Mr. Needham that the latter should assign to the former the mortgage of 1796, on being paid the sum due on foot of it, and also the costs of a bill of foreclosure which had been filed by Mr. Needham against Mr. Kent: and by his answer, Mr. Roberts admitted that he refused to receive his rent and costs, and paid Mr. Needham the mortgage debt in order to retain possession of the lands, and to prevent Mr. Needham from redeeming the same; and that he would not have paid Mr. Needham the amount of the mortgage debt, if he believed Mr. Needham would not have paid the arrears of rent and costs.

By an indenture bearing date the 13th of November 1819 (but which was not, in reality, executed by the grantor until the 4th of December), and made between Thomas Richard Needham of the one part, and John Roberts of the other part, after reciting the leases of 1793—the mortgage of 1796—the title of Thomas R. Needham thereto—that E. Kent had permitted a large arrear of rent to accrue due under each of the demises—the ejectments, and the service of Thomas R. Needham therewith, and the several proceedings thereon—that E. Kent did not within six months pay the rent and costs, or file a bill for redemption—the sum due to Thomas R. Needham on foot of the mortgage, and that he had agreed to receive, and John Roberts to pay the same—Thomas R. Needham in consideration of the sum due on foot of the mortgage, paid to him by John Roberts, and also in consideration of John Roberts releasing him from all rent and arrears of rent due on foot of said two leases, granted, bargained, sold, assigned, aliened, released, surrendered and confirmed unto John Roberts the said lands, to hold to him, his heirs and assigns for the lives named in said demises, and the survivor of them, and for all such further interest as E. Kent, John Scott, Thomas Needham, or Thomas Richard Needham, or any of them might have acquired under said demises, or any covenant therein contained. The deed contained a release by J. Roberts to Thomas R. Needham of all rent and arrears of rent due on foot of said two leases, and of all actions and suits in respect thereof; and also covenants by Thomas R. Needham that the sum therein mentioned was due to him on foot of the mortgage; that he had not done any act whereby the mortgage could be impeached or invalidated; that he had power to assign free from encumbrances; and for further assurance. At the same time, Mr. Needham assigned to Mr. Roberts the judgment collateral with the mortgage, and delivered to him the two leases of 1793.

Notwithstanding the refusal of Mr. Roberts to accept the rent and costs from Mr. Needham, he, in Hilary Term 1820, brought an action of covenant against Mr. Kent, to recover the arrears of the rents reserved by the leases of 1793; and also to recover a penal rent of £22. 15s. imposed on Mr. Kent, in case he should not, pursuant to his covenant for that purpose, make a certain avenue upon part of the demised premises. The case was brought down to trial in May 1821, and a verdict was given for £2252. 14s. 7d., being for ten and a-half years' rent of the premises; the jury being of opinion that the covenant to make the avenue had not been broken. Upon that verdict, judgment was entered up in the following Trinity Term. Mr. Roberts also, in Hilary Term 1820, issued a *scire facias* against Mr. Kent to revive the judgment collateral with the mortgage of 1796; and in Trinity Term 1820 obtained judgment thereon.

The original bill in this case was filed on the 20th of April 1820, E. Kent

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against John Roberts alone, and thereby he charged that Mr. Roberts suffered him to allow the rent to fall in arrear, under the belief that time would be given to him until he should receive money out of the said Chancery suit for payment thereof; and then suddenly brought his ejectment, when he was aware that he, Mr. Kent, was about to receive a large sum of money out of the said suit: and that Mr. Roberts so acted in pursuance of a plan long before formed by him, to evict Mr. Kent from the possession of the lands, and to obtain them himself. He submitted that by reason of the advance by J. Roberts of the mortgage debt, and the taking of the assignment of the mortgage to himself, and his acknowledgment of the rents and costs being tendered or ready for him, and which he might have received—and by reason of Thomas R. Needham's agreement to redeem the premises for the plaintiff, and the several other circumstances of the case, he, Mr. Roberts, became, within the nine months allowed for redemption, the assignee of the leases and the person bound and entitled to redeem the tenant's interest, and a trustee for him, Mr. Kent, as Mr. Needham would have been, and agreed to be, had he redeemed as agreed upon; and, therefore, that he, Mr. Roberts, could not now, or at any time, insist or pretend that his, Mr. Kent's, interest had been evicted; but on the contrary, that he had entitled Mr. Kent thereby, at any time, to redeem the mortgage and the interest accompanying the same, for his own use and benefit, on payment of the arrears of rent and costs due to him to the present time, and also the mortgage debt with interest thereon and costs.

The prayer of the bill was, that John Roberts might bring into Court all deeds, leases and documents in his possession relating to the premises, and particularly the two releases of the 26th of February 1793; and that he be enjoined from proceeding at law touching any of the matter contained in the plaintiff's bill: for an account of the sum due to him for rent and costs: also on foot of the sum paid by him to Thomas Richard Needham on account of the mortgage and interest thereon, since he so paid the same; and also for an account of what he had made of the lands since he entered into possession thereof; and that the plaintiff might get credit for the same out of the aforesaid claims: and that upon payment of the balance by the plaintiff, he might be declared entitled to a redemption, and be restored to the possession of the lands; and that the two releases of the 26th of February 1793 might be declared to be set up and established notwithstanding the judgment in ejectment.

The case made by John Roberts in his answer to that bill, was, that the plaintiff having neither redeemed the demised premises by paying the rent and costs within six months after the execution of the *habere*, nor within the same time filed a bill for a redemption, his right and interest in the lands, both legal and equitable, was gone and lapsed; and that it

was thereafter in the option of the defendant whether he would accept of the rents and costs from the mortgagee, and admit him to redeem; or pay him the sum due to him on foot of his mortgage: and that the plaintiff, after the expiration of the six months, had nothing whatever to do with the transactions between the defendant and the mortgagee. He denied that the ejectment was brought in pursuance of a preconcerted plan to deprive the plaintiff of the demised premises, or that he acted in collusion with Mr. Needham to take from the plaintiff the benefit of the right of redemption vested in Mr. Needham. Neither the original bill nor the answer thereto adverted to the settlement of 1794.

Issue was joined in this suit in Trinity Term 1822: but Mr. Kent became so embarrassed in his circumstances by reason of the proceedings already mentioned, instituted for the recovery of the arrears of rent and of the sum due on the judgment collateral with the mortgage, and also by reason of a suit instituted against him by Mr. Roberts to foreclose a mortgage of other premises belonging to him, for a different debt, that he was obliged early in the year 1823 to leave this country; and in May 1824 he died in London, insolvent and intestate, leaving a widow and ten children, of whom the present plaintiff Edward Kent was his eldest son and heir-at-law. He afterwards obtained letters of administration to the effects of his father, for the purposes of this suit.

John Roberts died in 1826, leaving five daughters his co-heiresses-at-law; who under the limitations of the settlement of 1774 became entitled to the lands of Shanganah as tenants in common in tail.

By his will, bearing date the 23rd of November 1813, he devised all his real and freehold estates to trustees and their heirs in trust to permit Jane Roberts, his eldest daughter, to receive the rents, &c., thereof during her life, and after her decease, in trust for her first and other sons in tail male; and for want of such issue of Jane, to his second daughter Martha for life, with like remainders to her first and other sons; and for want of such issue of Martha, to his third daughter Anne, the wife of Charles Riall, and the said Charles Riall and the survivor of them during their lives and the life of the survivor, and after the death of the survivor, to the use of their first and other sons in tail male; and for want of such issue, to his fourth daughter Elizabeth Roberts for life, with remainder to her first and other sons in tail male; with like limitations to his fifth daughter Charlotte, and her sons; with remainder to his own right heirs: and he appointed his daughter Jane Roberts sole executrix of his will. After his decease Jane Roberts obtained probate to this will. During the lifetime of John Roberts, and upon the occasion of the marriage of his daughter Anne, then a minor, with Charles Riall, an indenture of marriage settlement, bearing date the 4th of April 1801, was made and executed between Charles Riall of the first part, Anne Roberts of the second part, John Roberts of the third part, George Cockburne

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and A. Caldwell of the fourth part, and P. Riall and G. Putland of the fifth part, whereby John Roberts, for himself and Anne Roberts, then a minor, and Anne Roberts for herself covenanted with G. Cockburne and A. Caldwell, that in case the then intended marriage should be had, they would within six months after Anne Roberts obtained her age of twenty-one years (provided there should be no issue male of John Roberts and Martha his wife then living), suffer one or more recoveries of one undivided fifth part of the lands of Shanganah, or such other portion thereof as Anne Roberts should be then entitled unto: and it was thereby agreed that such recovery should enure to the use of John Roberts for life; with remainder to Charles Riall for life; with remainder (subject to a jointure for Anne Roberts) to the use of the first and other sons of the intended marriage in tail male. No recovery was suffered pursuant to that covenant; but in Trinity Term 1827 Charles Riall and Anne his wife levied a fine and suffered a recovery of one undivided fifth part of the lands of Shanganah; and by indenture, bearing date the 25th of June 1827, and made between Charles Riall and Anne his wife of the first part, G. Cockburne, the surviving trustee in the settlement of 1801, of the second part, and R. Maddock of the third part, it was declared that the recovery should enure to the uses and for the intents and purposes of the settlement of 1801, as contained therein, concerning the said Anne's portion of the lands of Shanganah.

There were issue of that marriage several children, of whom the defendant Phineas Riall was the eldest son; and upon his marriage in 1834, Charles Riall and Anne his wife, together with Phineas Riall levied a fine and suffered a recovery of the one undivided fifth part of the lands of Shanganah; and by deed, bearing date the 3rd of June 1834, which did not recite the previous settlement of 1801, and made between Charles Riall and Anne his wife and Phineas Riall of the first part, John Roe and Mary Anne Roe of the second part, Arthur Riall and M. V. Sankey of the third part, and W. Roe and J. Riall of the fourth part, Charles Riall and Anne his wife and Phineas Riall conveyed the said one-fifth of Shanganah to A. Riall and M. V. Sankey, their heirs and assigns, to the use (after marriage) of Phineas Riall for life, with remainder (subject to a jointure for M. A. Roe, and a term for raising portions) to the use of the first and other sons of the marriage in tail male. There was issue of that marriage a son, the defendant John Lewis Roberts Riall.*

Another of the daughters of John Roberts, Charlotte, married Benjamin C. W. Newberry. No settlement was executed upon her marriage; but afterwards she and her husband by fine and recovery, and deed to

* The statement of the contents of the several title deeds of the Riall family is taken from the answers of the defendants. The Editor regrets that he has not been able to test its accuracy by a comparison with the documents themselves.

lead the uses thereof, limited her one-fifth of the lands of Shanganah to such uses as she and her husband should appoint; and in default of appointment to certain uses for the benefit of herself, her husband and their issue. The other three daughters of John Roberts, Jane, Martha and Elizabeth, levied fines and suffered recoveries of their respective one-fifths of the lands of Shanganah, and acquired the fee therein.

By deeds of lease and release, bearing date the 20th and 21st of August 1827, and made between the five co-heiresses of John Roberts, and Charles Riall and Benjamin C. W. Newberry of the one part, and William Hopper of the other part, the parties of the first part demised to W. Hopper and his heirs, those parts of the lands of Shanganah which were formerly in the tenancy of Edward Kent under the two leases of 1793, together with other parts of the same lands, containing about twenty acres, for the term of three lives, with a covenant for perpetual renewal, at the lump yearly rent of £420, which was afterwards reduced to £400.

The plaintiff Edward Kent, as heir-at-law and personal representative of his father, on the 30th of March 1836 filed a supplemental bill and bill of revivor against Jane Roberts, Martha Roberts, Elizabeth Roberts, Charles Riall and Anne his wife, Benjamin Newberry and Charlotte his wife, and Phineas Riall, praying that he might be declared entitled to the benefit of the former suit, and that the same might be revived; and that he might be relieved according to the prayer of the original bill.

The defendants relied upon the same case as that made by the answer of John Roberts; and in addition relied upon the several fines which had been levied, and the settlement, and lease which had been made of the lands of Shanganah during the period when the suit was wholly abated, and, as they alleged, without notice of the plaintiff's claims, as a bar to the plaintiff's suit.

The plaintiff filed a second supplemental bill, stating the deaths of all the *cestui que vies* in the leases of 1793, and the birth of John Louis Roberts Riall, the eldest son of Phineas Riall; and prayed that he might have the same relief against J. L. R. Riall as he had prayed by his former supplemental bill; and that the defendants might be decreed to execute renewals of the leases of 1793 for the lives thereby named, pursuant to the covenants for perpetual renewal therein contained; and that he might be decreed entitled to stand in place of the defendants, and have the benefit of the increased rent reserved by the lease of 1827 to Hopper, during the term thereby demised, subject to the payment to the defendants, of the rents payable under the demises of 1793, and reserved to John Roberts deceased.

John Lewis Roberts Riall put in a common minor's answer to the last bill.

It was admitted by the Counsel for the plaintiff, that the deed assigning

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the mortgage to John Roberts, though dated the 13th of November 1819, was not in fact executed until the 4th of December following; and the Counsel for the minor, and the other defendants did not object to the answer of John Roberts being read against them.

The original bill charged that John Roberts or his agent with his consent, previous to the nine months to redeem having expired, wrote a letter to or for Mr. Needham, or his agent, stating that if he, Mr. Roberts, did not pay Mr. Needham his mortgage money, he bound himself thereby to admit thereafter that a legal tender had been made of the rent and costs in time to redeem; and that a bill had been filed so as to enable Mr. Needham to redeem if he should not be paid; or to that or some such effect. In answer to this charge the defendant J. Roberts stated, that he did not, nor did his agent with his consent or knowledge previous or subsequent to the nine months to redeem having expired, write a letter to or for Mr. Needham, or his agent, stating as in bill set forth or otherwise; but defendant saith he hath been informed and believes that it having been finally settled and agreed upon, that defendant was to pay Mr. Needham the sum due on his mortgage, and that Mr. Needham was to receive same, with which arrangement, as defendant was advised and submitted, the plaintiff had not at that time any thing whatever to do;—and that defendant's solicitor not having it in his power, on account of the press of business accruing upon the commencement of Term, to prepare the necessary deeds between Mr. Needham and defendant, so as that they could be examined by Counsel for both parties and completed previous to the 16th of November, when said nine months would expire; defendant's solicitor, at the desire of Mr. Needham, but without defendant's knowledge, wrote a letter to Mr. Needham to some such effect as that in bill stated; but for certainty as to the contents thereof defendant begs leave to refer thereto when produced and proved.

Upon this statement in the answer, it was proposed by the Counsel for the plaintiff to read the passage of the bill to shew what were the contents of the letter. The Counsel for the defendant objected; and the Court ruled that it could not be read.*

Mr. *Lefroy*, Q. C., Mr. *Smith*, Q. C., and Mr. *Gerraghty*, for the plaintiff.

The *Solicitor General*, Mr. *Blackburne*, Q. C., Mr. *Warren*, Q. C., and Mr. *Burroughs*, for the several defendants.

For the plaintiff it was argued, that whenever the mortgagee performed the several requisites entitling him to redeem the premises, the tenant

* Vide *Cox v. Allingham*, Jac. 339; *Owen v. Jones*, 2 Anst. 505.

was entitled to the benefit of them; and could not be deprived of that benefit by any arrangement between the mortgagee and landlord, to which he was not a party. That here the mortgagee had within the nine months expressed his readiness to pay the rent and costs to the landlord; which the latter had refused to take; and had dispensed with a formal tender of them to him; and, therefore, that this case was to be decided as if a formal tender of the rent and costs had been made by the mortgagee to the landlord. That by the 8 G. 1, c. 2, a tender of the rent and costs by the mortgagee to the landlord within the nine months, is sufficient to entitle him to redeem the premises. That it was not necessary that a bill should be filed within the nine months to complete the mortgagee's title to redeem; and if necessary, it was only so where the mortgagee sought to preserve his title to redeem, *in invitum* as against the landlord. That in this case the landlord, by taking an assignment of the mortgage, precluded the possibility of a bill being filed against himself; and by the same act admitted the existence of the mortgage, and the validity of the mortgagee's title to redeem, and that he thereby virtually redeemed the premises: that having become the assignee of the mortgage, he could not deny the existence of an equity of redemption in the lessee: and that the maxim, 'once a mortgage, always a mortgage,' applied. That so long as the relation of mortgagor and mortgagee existed between him and Mr. Kent, he could not say that the relation of landlord and tenant did not also exist between them. That the arrangement between the landlord and the mortgagee was a fraud and contrivance to deprive the tenant of the benefit he would have derived from the redemption of the premises by the mortgagee; and that having united in himself the two characters of mortgagee and landlord, he was answerable to the tenant in either of them. That as to the objections made to the pronouncing a decree against John Lewis Roberts Riall, he being, as it was alleged, a purchaser for valuable consideration without notice, they were not sustainable; for, first, the leases were registered: secondly, the title of the several defendants is derived under the settlement of 1774, which created the power under which this lease was made; and, therefore, they are bound by the lease: thirdly, the bill is to establish legal, not equitable rights: and fourthly, there was a *lis pendens* down to the present time. *O'Reilly v. Fetherstone* (a); *Raffety v. King* (b); *Wallis v. Glynn* (c); *Sheridan v. Casserly* (d); *Malone v. Malone* (e); *Isherwood v. Oldknow* (f), and *Twynan v. Pickard* (g) were cited and commented on.

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For the defendants it was argued, that when the original bill was filed

(a) 4 Bli. P. C. 161.

(c) 19 Ves. 380.

(e) 1 Ball & B. 32, n.

(b) 1 Keen, 617.

(d) Beat. 249.

(f) 3 M. & S. 382.

(g) 2 B. & A. 105.

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E. Kent had no equity entitling him to the relief he sought. That after the lapse of six months his equity, *quâ* tenant, was barred. That the mortgagee's right to redeem did not confer any equity upon the tenant : and that the benefit he derived from an actual redemption by the mortgagee, was consequential upon the right established by the mortgagee, not arising from any original equity in himself. That the mortgagee was not bound by any obligation or trust to redeem the premises ; and if not, neither was his assignee : nor did any equity arise from the circumstance of the landlord intervening to prevent the mortgagee doing that which he was not under any obligation to do. That where legal rights were not in controversy, and no equities between the parties, there was nothing to prevent one party obtaining an advantage over the other ; as in the case of a purchaser for valuable consideration with notice of dower, obtaining an assignment of a prior term to protect him from dower : or a party claiming under an unregistered deed purchasing up a title under a subsequent registered deed, and thereby depriving the intervening judgment creditors of their priority. That in all the cases in which the interception of an intended benefit by a third person was held to be fraudulent, there were *indicia* of actual fraud. That *O'Reilly v. Fetherstone* had no application to the present case, as there the mortgagee had actually obtained a decree for a redemption ; here he had only expressed an intention to redeem. That it was impossible to give relief according to the prayer of the bill, as Hopper, the tenant, was not before the Court ; for his right was to have a lease for lives renewable for ever derived from the fee ; and the plaintiff's right, he having submitted to be bound by the lease to Hopper, was to interpose his lease between that lease and the fee. In such circumstances, the only lease which the plaintiff could obtain from the defendants, was a lease of the reversion : and upon such a grant neither a clause of re-entry nor a power to distrain could be reserved. Again, the lease to Hopper included lands not demised to Kent, and the rent reserved thereby was a lump rent. That the plaintiff had been guilty of great *laches*, whereby his right, if any, was barred. That the title of the plaintiff was merely equitable, the requisites of the statute not having been complied with, and therefore that no decree could be made against John Lewis Roberts Riall, it not having been shewn that the trustees in the settlement of 1834 had notice of the leases of 1793 : for that there was no *lis pendens*, the suit having wholly abated in 1826, the plaintiff and defendant being then dead. The following cases were cited and commented upon : *Maundrell v. Maundrell* (a) ; *Swannock v. Lifford* (b) ; *Brace v. Duchess of Marlborough* (c) ; *Murtagh v. Tisdall* (d) ;

(a) 10 Ves. 261.

(b) Cited Co. Litt. 208, (a) note ; Reported, *nomine Hill v. Adams*, 2 Atk. 208. Amb. 6.

(c) 2 P. Wms. 491.

(d) 3 Ir. Eq. R. 85 ; S. C. 1 W. & Kelly, 20.

Lawless v. Kenny(a); *Sparrow v. Cooper*(b); *Giffard v. Hort*(c);
Kinsman v. Kinsman(d); 3 *Sug. V. & P.* 458, 460.

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During the argument, Mr. *Warren* was asked by Baron Pennefather whether, if the mortgagee tendered the rent and costs to the mortgagor within the nine months, with the intention of redeeming the premises, that was a redemption? To which Mr. *Warren* replied, that it was not a redemption *per se*, for that the mortgagee might retract; but that if he did not retract, it was a redemption. Baron Pennefather then put this case:—"By the statute, tender, in the case of a mortgagee, is equivalent "to payment. Suppose that the mortgagee had actually paid the rent and "costs to the landlord, which the latter accepted; could the landlord on "the following day, pay back the rent and costs to the mortgagee, and "the mortgagee accept of them, in defeasance of the tenant's rights? "*O'Reilly v. Fetherstone* decides, that after a decree establishing the "mortgagee's right to redeem, the landlord cannot do an act to defeat the "right to redeem vested in the tenant; and if tender be sufficient to vest "in the mortgagee a right to redeem, the title to redeem is then as com- "pletely vested in him as it is after a decree in his favour has been pro- "nounced; for the decree is founded on the tender. If the mortgagee "had paid the rent and costs to the landlord, that payment would have "vested the right of redemption and completed it; and would have con- "ferred and established in the tenant that which before was only doubtful. "The question comes to this, whether a tender by the mortgagee, made "*bonâ fide* and with a view of redeeming the entire interest, vests a title "to redeem in the tenant?"*

Dec. 2.

On this day the Court delivered judgment.

BRADY, C. B.

This case was argued at considerable length, but not more than its importance required: and it now remains to pronounce the judgment of the Court. Upon the proofs made in the cause, it appears that by a settlement of 1774, the lands of Shanganah were limited to John Roberts for life, with remainder to his first and other sons in tail male, with remainder to his daughters as tenants in common in tail general; and

(a) 1 H. & B. 377.

(b) 1 Jo. 72.

(c) 1 S. & L. 406.

(d) 1 R. & M. 617.

* In *Sheridan v. Dawson*, 1 Jo. 256, it was held, that if within the period allowed for redemption, the landlord accepted the rent and costs from any person deriving under the lease, the legal estate in the lease was thereby set up; and that it was not necessary to file a bill to continue the legal interest which the lessee derived under the lease.

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by it, power was given to Mr. Roberts to demise the settled lands for the term of three lives renewable for ever. In pursuance of that power, Mr. Roberts, by two several indentures of lease bearing date the 26th of February 1793, demised part of the lands of Shanganah to Edward Kent for the term of three lives renewable for ever, at rents amounting in the whole to the annual sum of £214. 10s. 11d.: and on the 25th of June 1796, Mr. Kent mortgaged his interest in the lands demised to him to J. Scott to secure the sum of £600; which mortgage afterwards became vested in Thomas Richard Needham, and so continued to be during the proceedings instituted by Mr. Roberts in the year 1818, for the recovery of the demised premises. In Trinity Vacation in that year, Mr. Roberts brought two ejectments for non-payment of rent, to recover the demised premises; and caused both the lessee and the mortgagee to be served with the summons in ejectment. Mr. Kent alone took defence to the ejectments: and afterwards in Michaelmas Term gave a consent for judgment: and on the 16th of February 1819 Mr. Roberts executed his *habere*, and got into possession. Mr. Kent did not within six months after the execution of the *habere*, pay the rent and costs, or file a bill for the redemption of the premises: but Thomas Richard Needham, the mortgagee, who had not been in possession of the mortgaged premises, after the expiration of the six months and before the expiration of the nine months allowed him by the statute, expressed to Mr. Roberts his readiness to pay him the rent and costs; which, however, Mr. Roberts refused to accept from him. It is not material to advert to the reasons which induced Mr. Roberts to act in this manner, for it is admitted that the proposal to pay the rent and costs was made by Mr. Needham to Mr. Roberts, and refused by the latter. A treaty was then entered into between Mr. Roberts and Mr. Needham for the purchase by the former of the mortgage vested in the latter; and Mr. Roberts, in his answer to the original bill, admits that he entered into that treaty to prevent Mr. Needham redeeming the premises; and that he would not have taken an assignment of the mortgage if he did not believe that Mr. Needham was ready to pay him the amount of the rent and costs. The agreement between Mr. Roberts and Mr. Needham was carried into execution by a deed bearing date the 13th of November 1819; but which was not, in fact, executed until a few days after the expiration of the nine months. It recited the mortgage deed, and the assignments of it; that a large sum (not saying how much, but leaving a blank for its amount) was due for principal and interest on the mortgage; and then Mr. Needham, in consideration of the sum of £1000 paid to him, and also in consideration of Mr. Roberts releasing him from the payment of the arrears of rent then due (and for which he was at law liable), conveyed the lands, by lease and release, to Mr. Roberts and his heirs, to hold for the lives of the *cestui que vies* in the leases of 1793 named, “and for and during all such

"other estate, right, title, term and interest, as Edward Kent, John Scott, Thomas Needham, or Thomas Richard Needham, might or could have acquired or derived under or by virtue of the original lease or any clause, matter, or thing, therein contained." There is no reservation of the right of redemption, as there ought to have been in an assignment of a mortgage; but this deed purports to be an absolute conveyance of the lands; and at the same time, the judgment collateral with the mortgage was assigned to Mr. Roberts.

This being the state of facts, on the 20th of April 1820, Mr. Kent filed his original bill against Mr. Roberts praying an account of the sums due for rent and the costs of the ejectments, and also on foot of the mortgage; and an account of what Mr. Roberts might have made of the premises; and for a redemption: and that in the mean time, Mr. Roberts might be restrained from proceeding at law against him on foot of the judgment collateral with the mortgage; or for the recovery of the arrears of rent. The first question therefore for the consideration of the Court is, what ought to be our decision, supposing the original cause had been brought to a hearing between the parties to it? That depends in the first place on the construction to be given to the ejectment statutes, with respect to the right of redemption given by them to the tenant and the mortgagee. By the 11 *Anne*, c. 2, a right of redemption is given to the tenant; but the third section of that statute saves from its operation the rights of mortgagees of the demised premises, who are not in possession. The 4 *G.* 1, c. 5, contains a similar saving clause: and the last statute upon the subject, the 8 *G.* 1, c. 2, is the only one which provides for the case of mortgagees of the demised lands, who are not in possession. By the fourth section of that statute it is enacted that where any lease, for the avoiding of which such ejectment is brought, shall before the bringing of such ejectment have been mortgaged for a valuable consideration, and the lessee and mortgagee, and their respective assignees shall be duly served with summons in the said ejectment, and a proper affidavit or affidavits of the said summons shall be made and duly filed, and the plaintiff shall obtain judgment and execution in the said ejectment; then if the said mortgagee or his assignee shall not within nine months after such execution executed, pay or tender unto such landlord or lessor the said rent in arrear and costs, to be ascertained in such manner as in and by the said acts is directed and appointed, then such mortgagee or his assignee, shall be barred and foreclosed of all relief or remedy in Law or Equity on account of the said mortgage; and the said landlord or lessor shall from thenceforth hold and enjoy the demised premises discharged and freed from the said mortgage, and the equity of redemption. The operation of these acts clearly was to reserve to the mortgagee out of possession, a power of redeeming the lease from eviction: the two first statutes left the time within which that redemption should be made, at

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large ;—the last limited it to the period of nine months after the execution of the *habere*. Upon the construction of these acts various questions have arisen ; but the most important point which has been judicially determined is, that if the mortgagee interfere and redeem the demised premises from eviction within the time given to him for that purpose by the act, he does so not merely for his own benefit, but also for the benefit of the lessee and of all other persons who claim an interest in the lease. That was the decision of this Court in the case of *Fetherstone v. O'Reilly* ; which was afterwards affirmed, upon appeal, by the House of Lords. It is admitted that in the present case, the mortgagee has not been as active as the mortgagee in *Fetherstone v. O'Reilly* ; for there he filed his bill and obtained a decree for redemption : but upon considering what was the meaning and effect of that decree, it will be found to be this, that the privilege of redemption given to the mortgagee was to be exercised by him not merely for his own benefit, but also for that of all other persons interested in the lease ; and that whatever he did enured to the common benefit of all deriving under the lease.

The first matter, therefore, which is to be taken into consideration is, what has Mr. Needham, the mortgagee, done in this present case, within the period of the nine months ?—and in my opinion, he has complied with and performed one of the conditions imposed upon him by the statute ; he has tendered the rent and costs. It is not necessary, even at law, where a strict proof of tender is required, to prove an actual tender of the money, if that tender be dispensed with by the opposite party ; *Thomas v. Evans* (a). There Lord Ellenborough lays down the law on this subject in these words, “ The actual production of the money “ due, in monies numbered, is not necessary, if, the debtor having it “ ready to produce and offering to pay it, the creditor dispense with the “ production of it at the time, or do any thing which is equivalent to “ that.” So in *Reay v. White* (b), Bayley, B., says, “ I admit that there “ was no strict tender ; but I think that the plaintiffs by their conduct “ dispensed with a tender ; and thus the case is as if a sufficient tender “ had been made.” And Vaughan, B., says, “ The case of *Jones v. Barkley*, shews that where one party is ready to do what is to be done “ by him, and the other party dispenses with his doing so, it is not necessary that a strict tender should be proved.” Now here there was an offer by Mr. Needham to pay the rent and costs, which Mr. Roberts refused to receive : and he admits that Mr. Needham was ready to pay him the rent and costs ; for that, if it had not been so, he would not have taken an assignment of the mortgage. If, therefore, this bill had been filed by Mr. Needham for a redemption of the premises, founding his claim thereto upon that offer by him to pay the rent and costs, I would

(a) 10 East, 101.

(b) 1 C. & Mee. 748.

hold that a sufficient tender thereof had been made by him : and having been made by the mortgagee within the time limited by the act for that purpose, the case of *Fetherstone v. O'Reilly* establishes that it enures as well for the benefit of the mortgagor as for the mortgagee.

The case of *Fetherstone v. O'Reilly* bears still further upon this case. There the mortgagee, having tendered the rent and costs, filed a bill for the redemption of the premises, to which the lessee was not a party : and the cause having been brought to a hearing, it was on the 9th of May 1817, decreed that the representatives of the mortgagee were entitled to redeem the lands on payment to the landlord of all rent and arrears of rent, and costs at law of the ejectment ; but without any costs in that cause : and the Court accordingly referred it to the Remembrancer to take the usual accounts ; and ordered that after payment of what should appear due to the landlord on the account within three calendar months after the Remembrancer should have made his report, the landlord should deliver up possession of the premises to the representatives of the mortgagee or their assigns ; or in default thereof, an injunction to put them into possession : and it was further ordered, that in case the representatives of the mortgagee should not within three calendar months pay such balance as should be due to the landlord for rent and costs, their bill should be dismissed with costs. That was a decree declaring the mortgagee entitled to redeem the lands,—giving him an option to do so upon certain terms ; but not binding him to redeem them. In that state of things, the landlord, to prevent the operation of the decree, entered into a treaty with the mortgagee to purchase from him the mortgage, and for a release of all his right and title to redeem the premises. The lessee then filed his bill, praying the benefit of the accounts decreed to be taken in the former cause : and the Court, upon full consideration, were of opinion that the arrangement between the mortgagee and the landlord was not one that could stand in the way of the lessee's right of redemption ; and their decree was affirmed by the House of Lords. In giving his opinion in that case, the Lord Chancellor, after stating that the mortgagee had filed a bill for redemption, says, " A decree was obtained in that suit, and after the proceedings had arrived at this position, an agreement was entered into between the landlord on one side, and the representatives of the mortgagee on the other, the object of which was to defeat the claims of those who were interested under the lease. The circumstances connected with this part of the transaction are detailed very particularly in the proceedings on your Lordships' table. I have read them with attention, and am satisfied the Court below acted correctly in refusing to sanction or support such an agreement, the object of which was to defeat, for the benefit of the landlord, the claims of those interested under the lease." That case is a decision that the claims of those interested under the lease are entitled to protection, as against

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a dealing between the landlord and the mortgagee for a purchase of the mortgage: and the question now is, whether there is any distinction between that case and the present.

In this case the mortgagee placed himself in a position to enable him to redeem the lands, and apprised the landlord of his intention to do so. The landlord by his interference,—by paying to the mortgagee the sum due on foot of the mortgage, and releasing him from the arrears of the rents—(and that, not for the purpose of extinguishing either the one demand or the other; for notwithstanding the release and the conveyance, he proceeded against the tenant on foot of the mortgaged securities, and for the rent, and by the very conveyance of the lands, he took them for the interest which the tenant might have acquired under his lease)—prevented the mortgagee from redeeming the premises. Under such circumstances, can it be said that the conveyance of the mortgage was not made to defeat the interest of the tenant, and with no other object? In my opinion, even if there had not been any tender of the rent and costs, neither the landlord nor the mortgagee had a right to buy or sell the privilege of redemption; and I found that opinion upon principles of public policy. If such dealings were allowed by the law, no mortgagee would redeem mortgaged premises evicted for non-payment of rent. He would, manifestly, prefer being paid his demand by the landlord; who might recover the sum so paid by suing on foot of the mortgaged securities. The principle of *Fetherstone v. O'Reilly* would be wholly defeated by permitting the mortgagee thus to sell his privilege of redemption. It is right, however, that I should advert to the arguments, which have been very forcibly urged on the Court in support of this transaction. It is said, that there is no obligation imposed on the mortgagee to redeem; and that the tenant has no right to complain if he does not do so: and cases have been cited to shew that the interception of an intended benefit, unless coupled with a promise, does not raise an equity. That may be admitted as a general proposition; but this case rests upon other principles. In equity, a mortgage is a security for the debt; and the mortgagee is answerable to the mortgagor for his dealing with the estate. Thus in the case of a new lease of the mortgaged premises being granted to the mortgagee, it is in equity considered to be a graft upon the old lease; and enures to the benefit of the mortgagor. Why so? In that case it may as well be said, as it was said here, that there was no obligation upon the mortgagee to take the new lease, or in the landlord to grant it to him: nevertheless a Court of Equity looks not to these abstract subtleties, but to the relative position of the parties; and says that the new lease was obtained by reason of the situation in which the mortgagee was placed, in respect to the property, by the mortgagor; and that he shall not derive a benefit to himself by taking advantage of that position. So here, the mortgagee may be quiescent if he please; he is not bound to redeem the lands; but

if he do so, he does it for the benefit of the tenant; and shall it be said that being thus the protector of the common title, he can deal with the landlord for a surrender of that right and title to redeem, to the prejudice of the tenant?

Again, take the case of a person having an exclusive power of appointment in favour of certain objects, the fund being given amongst those objects in default of appointment. The donee of the power may appoint to one of the objects, and so defeat the expectations of all the others. He is under no obligation to appoint to one only, or to all, he may do so if he pleases, or he may let the fund go as in default of appointment. But if he make a bargain for his own benefit with the intended appointee, and then makes an appointment to that individual, the transaction will not be permitted to stand: it is held to be a fraud upon the power; not because any benefit which the other appointee might have expected to enjoy has been defeated; but because of the position he is placed in with respect to the appointees, of which the law will not permit him to take advantage. Thus Sir W. Grant, in *Daubeny v. Cockburne* (a), says, "Now although the father, in proposing such a bargain, is much more to blame than the child in acceding to it, still it is impossible to say that an appointment, obtained by means of such an agreement, is fairly obtained. It is a fraud upon the other objects of the power, who might not, and in all probability would not, have been excluded but for this agreement. It is, more particularly, a fraud upon those who are entitled in default of appointment; for *non constat* that the father would have appointed at all, if the child had not agreed to the proposed terms." Thus the defeating a mere expectation, and without a promise, is, in such a case as that, considered a fraud in Equity, in consequence of the relative situations of the parties. So here, the expectation of the tenant, that his interest may be restored by the act of the mortgagee, is defeated by the bargain between the landlord and the mortgagee, to secure to the former the full possession of the lands, and to relieve the latter from his liability to the rent. With regard to the cases which have been cited as to the priority of judgments intervening between an unregistered and a registered instrument, and the late decision of the Master of the Rolls in *Murtagh v. Tisdall*, they do not apply; for in these, there is no privity between the parties. The judgment creditor gets a priority, which, in the inception of the transaction, he did not contract for. It is by chance that he obtains that priority, which is afterwards defeated by putting the subsequent registered deed out of the way; and he is restored to the position in which he was originally placed, and of which, therefore, he has no reason to complain. This is the opinion of Lord Plunket in *Lawless v. Kenny* (b). Again, it has been urged that a purchaser may defeat the

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(a) 1 Mer. 626.

(b) 1 Hud. & B. 377.

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title of the wife of the vendor to dower, by obtaining a conveyance of a prior outstanding term, with notice of her title. It is true, that such is the rule of a Court of Equity; but when I am called on to extend this doctrine to other cases, my answer is to be found in the language of Lord Eldon, in the very case cited to us in support of the position, *Maundrell v. Maundrell* (a), where he says, "It is a doctrine he cannot make consistent with any rational principle;"—"that it has prevailed upon no principle, but the practice of conveyancers."—"That if this were *res integra*, the proposition would be monstrous, that the purchaser, having notice of this right, and of the use that is to be made of a term outstanding by a Court of Equity, should buy in the term, and with full notice, not squeeze out any further encumbrance, but effectually displace the dower."—"That the Court was bound in that case, not by a principle on which it could well reason, but, by a practice of conveyancers found to be inveterate; that to that length it would go, but it would not go further." It is impossible to use language more strong in condemning that doctrine; and I will not follow that monstrous proposition, founded upon no rational principle, by applying it to a case which is not strictly the same.

Upon all these grounds, and not seeing any substantial difference between this case and that of *Fetherstone v. O'Reilly*, and concurring in the principle of that case, which ought not to be narrowed, I am of opinion that, supposing this case to have been brought to a hearing upon the original bill, and between the original parties, the plaintiff would be entitled to the relief he prays by his bill. But in the suit now at hearing, the defendants are the real and personal representatives of Mr. Roberts, and others who derive through him; and also certain other persons, who are now entitled to the lands, and whose title thereto is not derived from him, but under the settlement of 1774. The lease, however, was made pursuant to a power for the purpose, contained in that settlement; and if it subsist at Law or in Equity, it exists as against all the persons deriving under that settlement. The obstacles which have been set up in the way of the relief prayed are the lease of the premises, made to Hopkins, and the marriage settlements of Mrs. Newberry and Mrs. Riall, the co-heiresses of Mr. Roberts. As to the lease made to Hopkins, the plaintiff submits to be bound by it, so that the Court is not now embarrassed by it; and as to Mrs. Newberry's marriage settlement, it is post-nuptial, and can hardly be called a settlement, for it is a conveyance to such uses as she shall appoint, and in default of appointment, to the uses of her husband and herself and their issue. It therefore cannot interfere with the plaintiff's right. The difficulty in the case was occasioned by Mrs. Riall's marriage settlement; but upon looking at it, it

(a) 10 Ves. 246, 271.

appears that it does not contain any conveyance of the legal estate. In 1801, the lands were, by articles executed upon the marriage of Mrs. Riall, agreed to be settled: Mr. Roberts being then living, his daughter Mrs. Riall covenanted to settle the estate to the uses therein mentioned. After the death of Mr. Roberts, and upon the marriage of the defendant Mr. Riall, the eldest son of that marriage, the lands were re-settled; but Mrs. Riall is not a conveying or granting party in that settlement—she merely releases the jointure she was entitled to under the articles of 1801. Therefore, the defence that the minors are purchasers of the legal estate in the lands, without notice, is not open to them; for, in fact, there was not any conveyance of the legal estate by the settlement.

Upon all these grounds, I am of opinion that Mr. Kent is entitled to relief in this case. The terms upon which he is so entitled are, upon payment of the sum due upon foot of the mortgage, and also of the sum due for rent, and the costs of the ejectments. With respect to the profits of the lands received since the eviction, they have been *pro tanto* measured by the lease to Hopkins. That lease, however, comprises other lands than those in question; the rent reserved by it must therefore be apportioned, so as to give Mr. Kent the full benefit of the lease; and there must be a reference for that purpose to the Officer of the Court. And then it appears to me, that so far as regards the period from the making of that lease, hitherto, the apportioned rent will be the fair measure of the credit which Mr. Kent is entitled to as against the arrears of the rent; and as to the period antecedent, the profits which have been made are a matter to be inquired into by the Officer.

The lease under which Mr. Kent is entitled to these lands, is for a term of lives renewable for ever, upon payment of a renewal fine. We must, therefore, also direct an account to be taken of the sum due on foot of the renewal fines; and decree, that upon payment by the plaintiff of the balance, after deducting the sum found to be due by the defendants on foot of the account of the profits of the lands since the eviction, that a renewal of the original lease be executed to him by all proper parties, and so as to secure to him his proportion of the rent reserved by the lease to Hopkins.

As to the costs of the cause, there are statements which shew that the proceedings taken by Mr. Roberts were hard and oppressive; and the Court cannot overlook the fact that he sued the lessee for the rent which he had actually released to the mortgagee as a consideration for buying off his interference: and without going more into detail of the facts of the case, it is enough to say that the Court does not think that Mr. Kent should pay the costs of the persons claiming under Mr. Roberts, in a suit in which he succeeds in setting aside these transactions, and relieving himself from a dealing which the Court pronounces to be unconscientious and unjust.—No costs will be given at either side.

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PENNEFATHER, B.

This case appears to me to fall within the principles laid down by this Court in *Fetherstone v. O'Reilly*; nor can I perceive that any sound distinction exists between the situation of the parties in this case, and in that. In that case, it is true, the mortgagor filed his bill within nine months; whereas in the present case, no bill was filed, but the mortgagee tendered the rent and costs within the period allowed for redemption. The decree obtained by the mortgagee in *Fetherstone v. O'Reilly* did not confer on him any right to redeem the premises; it merely declared the existence of the right he already had to redeem. It directed the usual account to be taken; but did not bind the mortgagee to prosecute his rights: on the contrary, it gave him an option to do so, or not; declaring, that if he should not pay the landlord the sum which it should appear on taking the accounts to be due to him, within a limited time, his bill should be dismissed with costs. The decree in that case operated thus far: it adjudged that the mortgagee had an antecedent right to redeem. After it was pronounced, the landlord, to prevent the redemption of the premises, purchased up the benefit of the decree, and the mortgagee's rights. Compare, now, the facts of the present case as to this point. Here, the six months allowed the tenant to redeem had elapsed; but within the nine months, the mortgagee tendered to the landlord the amount of the rent and costs. I say tendered—for he did that which the landlord considered as equivalent to, and consented to adopt as a tender. The mortgagee thereby brought his case within the 4th section of the 8 G. 1, c. 2, and established his right to redeem the premises. He was then, so far as regards his right to redeem the lands, precisely in the same situation as the mortgagee in *Fetherstone v. O'Reilly*. In both cases, the mortgagee tendered the rent and costs within the nine months. In addition to that, the mortgagee in *Fetherstone v. O'Reilly* filed his bill, and obtained a decree for a redemption; but in each case, there was the same antecedent right to redeem. The decree gave no right; it arose from the offer of the party to pay the rent and costs. Again, it was with the very same object as that of the landlord in *Fetherstone v. O'Reilly*, that Mr. Roberts entered into the treaty with the mortgagee, and purchased up his rights, whatever they might be, by paying off the mortgage. The decree in that case establishes this principle—that after the mortgagee has done all that was necessary to effect a redemption of the premises, the landlord shall not interfere to prevent the exercise of that right of redemption by him, to the prejudice of those who might be benefited by it—that there is that in the relation of mortgagor and mortgagee, and landlord and tenant, that the landlord shall not be permitted to take advantage of his situation, or interfere to prevent the exercise of the right to redeem, which the mortgagee has established. That right, if exercised, enures to the benefit of the tenant. Whether the redemption

by the mortgagee would enure to the benefit of the lessee, or not, was, at the time of this transaction, considered doubtful. Mr. Roberts was of opinion that it would not; that after the six months, the right of the tenant was gone for ever, and that he might deal with the mortgagee as he thought proper: but the decision of the House of Lords, affirming the decree of this Court, establishes that the right of the mortgagee to redeem the lands enures to the benefit of the tenant, and Mr. Roberts must abide by the law as it is now established.

These are the particular circumstances upon which, in my opinion, our decision ought to be rested. I am very far, however, from dissenting from the position which the Chief Baron has laid down in his judgment, namely,—that the landlord is not at liberty, at any time, to deal with the mortgagee for an assignment of the mortgage, without subjecting himself to all the equities the tenant might have by reason of any act of the mortgagee; but I do not consider it necessary to go so far for my judgment in the present case, the mortgagee having indicated his intention to redeem, and having actually taken steps for the purpose. Here, the mortgagee had determined to act—the landlord was aware of it—and that determination and readiness to act brings the case within the principle of *Fetherstone v. O'Reilly*. There are many reasons why, however any other person may deal with the mortgagee after eviction, the landlord is in such a situation that he ought not to be permitted to do so to the prejudice of the tenant.

With regard to the present defendants, it appears to me that, upon the grounds stated by the Chief Baron, they cannot rely upon the defence of being purchasers for valuable consideration without notice. The settlement of Mrs. Newberry is clearly post-nuptial, and does not affect to convey any estate which could be relied on as a purchase for valuable consideration. The settlement of Mr. Phineas Riall appeared, for some time, to raise the question; for on its face, it appeared to be a conveyance of the legal estate for valuable consideration; and no notice by the trustees, other than an alleged *lis pendens*, was proved to have existed. But Mrs. Riall the elder was not a party to the conveyance in that settlement; and the rights of the parties claiming under the settlement of 1801 were merely equitable. There is, therefore, no conveyance of the legal estate to the trustees of the settlement of 1834. It is, therefore, unnecessary to take the question into consideration; or to decide how far, even supposing the defendants were purchasers for value, they would be affected by the *lis pendens*.

FOSTER, B., having been absent during a material portion of the argument, did not pronounce any judgment.

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RICHARDS, B.

I fully concur in the decision to which the Court has come. I am of opinion, that upon grounds of public, or rather general policy, it is not competent to a mortgagee, who has made a tender of the costs within the time prescribed by the act of Parliament, to sell, for money or other consideration, or for the landlord to purchase from him, the right of redemption established by that act. If there were no case bearing upon the subject, I would be prepared upon principle so to decide it; but, in my opinion, *O'Reilly v. Fetherstone* rules this case.

COURT.—Declare the plaintiff entitled to redeem the lands of Shanganah, comprised in the two leases of the 26th day of February 1793, in the pleadings mentioned, upon payment of all rent and arrears of rent and costs at law of the ejectment in the pleadings mentioned; and also on payment of the principal and interest and costs due on foot of the mortgage, bearing date the 25th of June 1796, in the pleadings mentioned, as the same shall be found due on foot of the accounts hereinafter directed: and refer it to the Chief or Second Remembrancer to take an account of what is due for rent of the said lands, and for costs of the ejectments in the pleadings mentioned. And declare that the plaintiff is entitled to an account of the profits of the said lands from the time of the execution of the writs of *habere* in the pleadings mentioned: and refer it to the Chief or Second Remembrancer to take an account of what John Roberts, deceased, in his lifetime, and the defendants who have been in receipt of the rents and profits of the said lands since his decease, really and *bonâ fide*, without fraud, deceit, or wilful neglect, made of the said lands, from the time of his the said John Roberts entering into the possession thereof. And the plaintiff having offered and consenting to abide by the lease of the 20th day of August 1827, made to William Hopper, let the said Chief or Second Remembrancer apportion the rent payable under said lease and as now receivable under the same, in respect to the said lands of Shanganah, being part of the lands thereby demised, and which are comprised in said two leases of 26th day of February 1796; and ascertain accordingly how much of the whole rent reserved in the said lease to the said William Hopper is properly payable, having regard to such apportionment, out of the said lands of Shanganah. Declare that the portion of the rent, to be so ascertained as payable in respect to the said lands of Shanganah comprised in said lease, shall be taken as the profit of said lands since the period of the execution thereof; and, the parties not objecting, also let the said apportioned rent be taken as the

profit of said lands for the period antecedent to the execution of the said lease, from the time of the execution of the said writs of *habere*. And let the said Chief or Second Remembrancer set off against the rent and costs to be found due on the account thereof above directed, the profits of said lands according to the above directions, from the time of the execution of said writs of *habere*; and strike a balance. And let the said Chief or Second Remembrancer take an account of what is due for principal, interest and costs on foot of the mortgage of the 25th of June 1796, in the pleadings mentioned (the plaintiff not to be bound by the sum stated as the sum paid for the consideration of the assignment thereof by Thomas R. Needham to the said John Roberts, deceased, in the pleadings mentioned), such costs not to include any costs of proceedings on the judgment collateral with said mortgage. And let the said Chief or Second Remembrancer set off against the said mortgage debt, interest and costs, from time to time, one half-year within another, such balance, if any, as shall appear due to the plaintiff on the account before directed, to be set off first to liquidate the costs which form part of the consideration of the assignment of the mortgage, then in payment of interest, and lastly to sink the principal; and let the said Chief or Second Remembrancer strike a balance. And decree the plaintiff, in case he shall redeem, entitled to a renewal of the said two leases of the 26th day of February 1793, for the lives of her present Majesty Queen Victoria, and Prince George William Frederick and the Princess Augusta Carolina, son and daughter of his Royal Highness the Duke of Cambridge, being the lives nominated by the plaintiff in his supplemental bill filed on the 14th of April 1838, on payment of all rents, renewal fines and interest, and septennial fines and interest; and refer it to the Chief or Second Remembrancer to take an account of what is due for such rent, renewal fines and interest, and septennial fines and interest; and also to settle and approve of a proper deed of renewal of said leases, it being intended that such renewal shall operate and be so made, as to secure to the plaintiff as against the defendants and the persons deriving under said lease to said William Hopper, the proportion of the rent reserved by the lease to the said William Hopper on the apportionment hereinbefore directed, as properly payable out of the said lands of Shanganah, subject to the payment of the rent reserved by said leases of the 26th of February 1793, the same to be secured by such deed of renewal; and which deed shall contain proper clauses and covenants for the production of the counterpart of the said lease to the said William Hopper, and of all renewals

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thereof. And decree the defendants, on payment of such sum as shall be found due on foot of such rent, renewal fines and interest, and septennial fines and interest, to execute to the plaintiff such deed of renewal. And in default of payment by the plaintiff of the sum, if any, to be found due for rent and costs of ejectment, and on foot of said mortgage, on the accounts hereinbefore directed, within three months after the confirmation of the report, let the plaintiff's bill stand dismissed with costs. This decree not to affect the rights of any of the defendants as between each other in respect to the real and personal estate of the said John Roberts, or otherwise. No costs in the cause.

Reg. Lib. l. p. 424.

NEWENHAM and another, by HALLIGHAN, their next Friend,

v.

MAHON and others.

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 Jan. 14, 21.
 Feb. 6.

The litigious conduct of a tenant in defending an ejectment for non-payment of rent, does not disentitle him to relief upon a bill for redemption; nor to the costs of that suit, if he be otherwise entitled to them.

A decree for a redemption pronounced against a landlord, with costs; his defence being unfounded, and his conduct in refusing information to enable the tenant to redeem, inequitable and oppressive.

Semble: that if there be two leases of different premises from the same landlord to the same tenant, and the landlord evict the tenant from both for non-payment of rent, the tenant may redeem the one, and not the other.

By indenture of lease, dated the 3d of April 1805, Wogan Browne demised to Thomas Newenham (the father of the plaintiffs) and his heirs, a plot of ground at Kilcock called the New Lotts, to hold for the term of three lives renewable for ever, at the yearly rent of £10, late currency, payable half-yearly on every 25th day of March and 29th day of September in every year. Wogan Browne afterwards conveyed the reversion to Robert Fyan; who in 1815, became a bankrupt, and his interest in the reversion was sold under the commission, to John Pepper, and was conveyed to him by deed of the 8th of January 1816. In 1827, a commission of bankrupt issued against John Pepper and William Locke, his partner in trade, under which they were found and declared to be bankrupts. The defendants, N. Mahon, W. Henry, and J. Stevenson were appointed assignees; and the usual bargain and sale of the bankrupt's estate was made to them by the Commissioners. In 1829, Robert Fyan filed a bill in Chancery against the defendants and John Pepper, impeaching their title to the premises sold under Fyan's bankruptcy; and praying, amongst other things, that a receiver might be appointed to receive the rents of said premises. In April 1832, a receiver was appointed in that cause.

Thomas Newenham, the lessee, by his last will, dated the 26th of October 1829, devised the premises contained in the lease of 1805 to the plaintiffs, who were two of his younger children, and then minors. He died on the 6th of August 1833. During his lifetime, he suffered

from the same tenant, and the landlord evict the tenant from both for non-payment of rent, the tenant may redeem the one, and not the other.

the rent to run into arrear ; and in Easter Term, 4 *W.* 4, an ejectment for non-payment of rent was brought in the Court of King's Bench, to recover the premises demised by the lease of 1805 ; in which action the defendants, the assignees of J. Pepper and W. Locke, were the lessors of the plaintiff. This ejectment was in reality brought by the receiver in the cause of *Fyan v. Mahon*, pursuant to an order of the Court of Chancery, and a report of the Master thereunder. The receiver, as of the same Term, and in the same Court, and by the same authority, brought another action of ejectment for non-payment of rent (in which the defendants were also lessors of the plaintiff), to recover possession of another holding near Kilcock, called the Three-Acre-Field, which had been held by Thomas Newenham, the testator, under another and distinct lease to him thereof made by R. Fyan. Defences were taken to both ejectments in the name of the minor Thomas Newenham, one of the plaintiffs in this suit. In both actions, notices were served on behalf of the defendant therein, that upon the trial, he would dispute the petitioning creditor's debt, the trading, and the act of bankruptcy upon which the commission of bankrupt against J. Pepper and W. Locke had issued. The two actions went down to be tried at the Spring Assizes of the year 1835, for the county of Kildare ; and upon the trial of the ejectment for the New Lotts (it being the first called on), the plaintiff proved the several proceedings in the bankruptcy, and obtained a verdict ; and the jury ascertained the amount of rent due up to the day of the demise in that ejectment to be £27. 13s. 10d. The will of Thomas Newenham was not given in evidence upon the trial ; and the Counsel for the defendant objected that his heir-at-law had not been served with the summons in ejectment. The Chief Justice, before whom the cause was tried, overruled the objection ; and thereupon the defendant tendered a bill of exceptions. The other case was not actually tried ; but a jury were impanelled, who returned a verdict for the plaintiff, and ascertained the amount of the rent to be £57. 5s. 9d. In that action also, a bill of exceptions similar to the other was tendered. The two bills of exceptions were set down for argument by the lessors of the plaintiff, the defendant having neglected to do so ; and upon debate, the exceptions were overruled, and judgment given for the plaintiff in each action.

On the 2nd of March 1836, possession both of the New Lotts and of the Three-Acre-Field was delivered by the Sheriff of the county of Kildare to the lessors of the plaintiff, pursuant to two several writs of *habere* founded upon the judgments in ejectment. After the verdict, and before execution executed, the receiver originally appointed in *Fyan v. Mahon* was removed, and E. Luscombe was appointed in his place. J. S. Molloy, who was the attorney of the assignees of the bankrupt in this suit, was also their attorney in the action of ejectment, and likewise the solicitor for E. Luscombe, and the former receiver in *Fyan v. Mahon* : and it appeared

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that in June 1836, applications were made to him by the attorney for the defendant in the ejectment suit, to furnish his costs in the action brought for the recovery of the New Lotts; which he declined to do: in consequence whereof a notice of motion, dated the 21st of June 1836, was served upon Molloy as the attorney for the plaintiff in the ejectment, that Counsel on behalf of the defendant would apply in Chamber to compel the plaintiff's attorney to furnish his costs in the cause, and to proceed to tax the same; in order to enable the defendant to redeem the premises called the New Lotts, by paying off the arrears of rent due thereon and such costs, which the defendant thereby undertook to pay. This application was opposed by Counsel on behalf of the lessors of the plaintiff: no rule was made on the motion; on the ground, as it was alleged at the Bar, that the undertaking to pay the costs was made by a minor, and not binding.

On the 27th of August 1836, P. Hallighan, as the next friend of the minors, caused a notice of that date, entitled in the ejectment cause, to be served on the assignees of the bankrupt, on Luscombe the receiver, and on Molloy, requiring them to furnish or state the amount claimed by them in that cause on foot of the rent of the New Lotts, and costs; on which he personally undertook, as their next friend, forthwith to pay the same in order to redeem the premises, and to go before the proper Officer, if necessary, to ascertain the exact amount thereof: and informing them, that if they refused that offer, and that it became necessary to file a bill to redeem the premises, that notice would be made use of to charge them with the costs thereof. No answer having been given to that notice, the sum of £150 was, on the 29th of August 1836, tendered to the defendant, N. Mahon, one of the assignees of the bankrupts, as and for the rent and costs of the ejectment for the New Lotts: which tender was refused. E. Luscombe, the receiver, was at that time in England; and as a tender could not be made to him, Hallighan, as the next friend of the minors, caused a notice entitled in the ejectment cause, and dated the 30th of August 1836, to be served on the assignees and on Molloy their attorney, informing them that he was still ready on behalf of the minors to pay any sum claimed for rent and costs in the action of ejectment for the recovery of the New Lotts; and that as the receiver appointed over the lands was not then in Ireland, he would at the hour of twelve o'clock on the following day, attend at the office of J. S. Molloy, attorney on record for the lessors of the plaintiff, and would then and there pay such rent and costs; and that this notice would be made use of to charge the parties with the costs of any proceedings requisite for the redemption of the premises. After the service of that notice, a notice dated the 30th of August 1836, was served by Molloy as solicitor for Luscombe, and on behalf of the defendants, on Hallighan, apprising him, in reply to his notice of the 27th of August, that inasmuch as the ejectments were brought by the receiver

under the order of the Court of Chancery, without any interference or direction of the defendants, they, the defendants, had no other interest therein than as assignees of the bankrupt; and that as such lessors of the plaintiff, they did not consider themselves warranted, pending the receivership, to intermeddle with the rents or proceedings without the order of the Court first obtained for that purpose. It did not appear when, precisely, this notice was served upon Hallighan.

On the 31st of August, a person on behalf of the minors attended at the hour of twelve o'clock at the office of J. S. Molloy with the sum of £150, in order to pay or tender it for the rent and costs: Molloy, however, was not then at his office, nor did any person attend there to accept of the same; and the person who was sent with the money tendered it to his clerk, who refused to accept of it. It however happened that about the hour of one o'clock the same day, the person who was so sent with the money accidentally met Molloy in the street, and then tendered him the sum of £150; which the latter refused to accept, saying that it was less than the amount of the rent and costs, and that if it were for no other reason he would not receive said tender because it was not all in gold.

On the 1st of September 1836, the plaintiffs, by J. Hallighan, their next friend, filed the present bill for a redemption of the premises comprised in the lease of 1805, and on the next day lodged the sum of £150 in Court for the rent and the costs of the ejectment.

On the 1st of September Molloy furnished Hallighan with an account of the rent and costs due for each of the premises evicted for non-payment of rent, so far as the same could then be ascertained; part of the costs being then untaxed. In that account it was stated that the sum due for rent out of the New Lotts, as ascertained by the verdict, was £27. 13s. 10d.; that the sum due for rent from the time to which the jury had calculated it, to the execution of the *habere*, was £13. 16s. 11d.; and that the sum due to the former receiver for the costs of the ejectment was £104. 7s. 7d.; and the sum due to the present receiver for his costs, and then untaxed, was £43. 8s. 7d. In the same account it was stated, that the sum due for rent and costs out of the premises in the other ejectment, was £155. 15s. 10d. And at the foot of the account was a notice from Molloy, apprising Hallighan that the same was furnished to him without admitting on the part of the receiver, who was then absent from Ireland, the right of the plaintiff to redeem the premises; and also apprising him that the receiver could not interfere further without an order of the Court of Chancery. This notice was received by Halligan before the money was lodged in Court, but not until after the bill in this cause was filed.

By their answer the defendants said, that for the reasons therein mentioned, viz., the objection made on behalf of Thomas Newenham, the minor, that the heir of the lessee had not been served with the summons in the ejectment, they did not believe that Thomas Newenham the lessee,

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at any time duly, or at all, made, executed or published his last will and testament, of the effect and import in the bill mentioned; and insisted that the plaintiffs were not entitled to redeem the premises, inasmuch as they had not any estate or interest therein: and also inasmuch as they had not lodged a sum sufficient to pay the amount of the rent and costs properly due and payable by them: and, therefore, that their bill should be dismissed with costs: and further, that supposing, but not admitting, that they should now be permitted to redeem the said premises, such permission should not be granted except on the terms of paying all rent and costs due on foot of the premises called the Three-Acre-Field; the defences to both which ejectments, the defendants submitted were conducted in a vexatious and litigious manner.

Upon reading the will of Thomas Newenham, it appeared that the plaintiffs were not entitled to the Three-Acre-Field, or to any interest therein.

The costs had not been taxed, otherwise than *ex parte*, when this suit was first brought to a hearing. The Court, therefore, ordered them to be taxed between party and party, the cause to stand in the list in the mean time. After much litigation, they were taxed to the sum of £120. 0s. 10d, which, together with the sum of £27. 13s. 10d., the amount of the rent as ascertained by the jury, amounted in the whole to the sum of £147. 14s. 8d.

Mr. Smith, Q. C., for the plaintiff.—The will of Thomas Newenham having been proved, and the sum of money lodged in Court having been ascertained to be more than sufficient to cover the amount of the rent and costs of the ejectment, the only remaining questions are, whether the plaintiffs can redeem the premises demised by the one lease, without redeeming those demised by the other; and the costs of the suit. *Swanton v. Biggs* (a) was a much stronger case than the present. There the tenant committed various breaches of covenant,—had cut down timber, and permitted the buildings on the demised premises to become dilapidated. Nevertheless, the Court held that they could not connect the right of the tenant under the statute to redeem the premises, which had been evicted for non-payment of rent, with any extrinsic matter of waste or breach of covenant, so as to make the tenant pay compensation for them as a condition connected with the relief to be granted to him. The principle of that case is supported by the decision of the House of Lords in *Trant v. Dwyer* (b), where it was held that it was not a defence to a bill for a renewal of a lease for lives renewable for ever, that a tenant had cut bog, part of the demised premises, contrary to his covenant; and had also encroached upon other lands of the landlord. The plaintiffs are also entitled to the costs of this suit. They have been

(a) Beat. 170.

(b) 2 Bligh, N. S. 11.

compelled to institute it by reason of the oppressive conduct of the defendants, who refused to furnish their costs in order to have them taxed; and would not accept of the full amount due to them for rent and costs, although tendered to them. It would be a monstrous position to establish, that no matter how unjust or oppressive the conduct of the landlord might be, he shall not pay costs in redemption suits.

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Mr. *Bennett*, Q. C., and Mr. *Radcliffe*, for the defendants.—The ejectment statutes do not give any new right or equity to the tenant to redeem; on the contrary, they cut down the equity which the tenant formerly possessed, viz., that of redeeming the premises after an indefinite lapse of time. The language of the 11 *Anne*, c. 2, is, that if the tenant permit judgment to be recovered and execution, without doing certain acts specified in the statute, he shall be barred and foreclosed of all relief or remedy at law or in equity;—not that upon doing those acts he shall be entitled to relief. The title of the tenant to relief is equitable, not legal; he has no *right* to a redemption upon the mere compliance with the requisites of the 11 *Anne*, c. 8, if the case be such, that before the passing of that statute, a Court of Equity would not have given him relief; for the statute is not imperative, and the Court does not act ministerially but judicially in the matter; *Berney v. Moore* (a); *Kenmare v. Supple* (b). This is further proved by the circumstance, that the tenant is bound to pay the costs of the redemption suit, though he succeed in it; which could not be the case if he were entitled to a decree for a redemption as a matter of right and not of favour. *Biddulph v. St. John* (c); *Bodkin v. Vesey* (d); *Wilde v. Manly* (e); *Butler v. Bourke* (f). The conduct of the plaintiffs in this case has been so vexatious and inequitable, that they have disintituled themselves to any relief. They have put their landlord to great expense by contesting the bankruptcy of Pepper and Locke,—a fact which was well known and had been proved in several previous trials. They concealed the true nature of their title upon the trial of the ejectment, and set up a pretended title in their elder brother. They took exceptions to the Judge's charge upon technical and unfounded objections:—they pursued this course in both actions; and having thus put their landlord to great expense, they now seek to redeem the premises demised by the first lease only, without paying the rent of the premises demised by the second lease, or the costs of the second ejectment. In addition, they attempted, upon the taxation of the costs in the action of ejectment for the New Lotts, so to divide the costs incurred by the lessors of the plaintiff in the two actions, as that the principal portion of

(a) 2 Ridg. P. C. 310.

(b) Vern. & S. 1.

(c) 2 Sch. & L. 521, 535.

(d) 1 Jo. 139, 152.

(e) 2 Mol. 413.

(f) 1 Dru. & W. 380, 392.

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them should appear to have been incurred in the other action, which was most fraudulent: and finally, they have filed an useless and expensive bill for a redemption in this Court; for they might have had all the relief they are entitled to by procuring a reference to the Master in the Chancery cause, to ascertain the rent and costs payable by them, and paying the same.

But if the Court should be of opinion that these circumstances are not sufficient wholly to disentitle the plaintiffs from the relief they seek, at least they are such, that the Court will refuse to permit them to redeem the one set of premises without paying the rent and the costs of the ejectment for the recovery of the other. In the cases cited for the plaintiff, the landlord was only entitled to damages for the acts complained of; therefore, the Court left him to his action: but there is no case where it has been held, that a tenant who has been ejected from two holdings under the same landlord, may redeem the one and not the other. On the contrary, the principles upon which Courts of Equity act in relation to mortgages, leads to an opposite conclusion. If a man make two separate mortgages of two distinct denominations of land, to secure two separate debts to the same mortgagee, he will not be permitted to redeem the one, without also redeeming the other: *Rayson v. Sacheverel* (a); *Shuttleworth v. Laycock* (b); *Ex parte Carter* (c); *Ireson v. Dean* (d); *Willis v. Lugg* (e); *Margrave v. Le Hooke* (f); *Jones v. Smith* (g); *Pope v. Onslow* (h): and this doctrine has been enforced against a purchaser as well as against the heir of the mortgagor; *Ireson v. Dean*.

Then as to the costs of the suit: the general rule is, that the defendant is entitled to them, even although the plaintiff obtain a decree for a redemption: and the special circumstances of this case would of themselves warrant the Court in refusing relief except on the terms of paying all the costs incurred. The plaintiffs were informed that the lessors of the plaintiff were merely assignees of a bankrupt; that a receiver had been appointed over the premises; that both the plaintiffs and the receiver were acting under the directions of the Court of Chancery, and could not interfere except under an order of the Court; yet they refused to procure an order authorising them to receive the amount of the rent and costs. Tender is not sufficient, within the statute, to preserve the premises from eviction, and there is no case where the landlord has been visited with costs because he declined to accept a tender. *Kenmare v. Supple* (i).

(a) 1 Vern. 41.

(c) Amb. 733.

(e) 2 Eden, 80.

(g) 2 Ves. jun. 376.

(b) 1 Vern. 245.

(d) 2 Cox, 425.

(f) 2 Vern. 207.

(h) 2 Vern. 286.

(i) 1 Ver. & S. 1.

Mr. J. Plunket in reply.—In *Swanton v. Biggs* (a), and *Wadman v. Calcraft* (b), it is laid down that the tenant, upon performing the acts required by the statute, is entitled to a redemption as of right;—that although the statute does not confer a right to redeem, it supposes the previous right of the tenant to relief. The Courts will struggle against a forfeiture; and if compensation can be made, they will give relief; *Davis v. West* (c); *Sanders v. Pope* (d). As to the defence set up, that the plaintiffs must redeem both the premises or neither, the foundation of it fails; for the plaintiffs are not entitled to the premises demised by the second lease: and the rule as to mortgages only applies to cases where the same person is entitled to the equity of redemption of both estates; *Jones v. Smith* (e). As to any alleged misconduct of the plaintiffs in the manner in which they conducted the defence in the action of ejectment, it cannot afford a ground for refusing them relief in this suit, for the landlord has received full satisfaction for it in the costs which the defendants in that action have been adjudged to pay. And as to costs of this suit, there is no general rule, such as has been contended for, that in redemption suits the landlord is entitled to his costs, no matter how unrighteous his defence may have been. In *M'Innerheney v. Galway* (f), it appears upon searching the Registrar's book, that the Court pronounced a decree for a redemption, without costs on either side. The cases cited by the defendant, upon this point, do not establish the general rule contended for. In *Biddulph v. St. John* the plaintiff asked a favour; for his mortgage had not been registered: in *Beasley v. D'Arcy* the bill was not filed under the statute; neither was it in *Butler v. Bourke*, which case was decided upon a constructive waiver of the forfeiture. The case of *John v. Armstrong* (g), and *Hall v. Smith* in this Court are authorities to give a decree against the defendants with costs: and as a general rule, costs ought to follow the event of the suit; *Millington v. Fox* (h): *Burgh v. Kenny* (i).

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BRADY, C. B.—[After stating the facts of the case.]—The first question is, are the plaintiffs entitled to be relieved in this suit? The bill has been filed in due time; a sum of £150, which is more than sufficient to discharge the rent and costs of the ejectment, has been lodged in Court on the filing of the bill; and the plaintiffs are legally entitled to the interest under the lease which has been evicted. It would, therefore, at first sight appear that this is an ordinary case in which the plaintiffs are clearly entitled to a decree for a redemption of the premises. But the defendants oppose

(a) 1 Beat. 170.

(c) 12 Ves. 475.

(e) 2 Ves. jun. 473.

(g) Ll. & G. temp. Plunket, 392.

(i) 1 Ir. Eq. R. 264.

(b) 10 Ves. 67, 70.

(d) 12 Ves. 282.

(f) 1 Jo. & C. 247.

(h) 3 M. & C. 352.

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the claim of the plaintiffs upon these grounds:—that the plaintiffs have strongly and vehemently resisted the several ejectment proceedings;—that they set up a defence at the trial which involved the lessors of the plaintiff in considerable expense; for they took a bill of exceptions to the Judge's charge upon a point which was afterwards overruled by the Court, but which imposed on the lessors of the plaintiff the necessity of incurring further costs;—and that they ought not now be permitted to redeem those premises, unless they also redeemed other premises, evicted at the same time by a separate ejectment brought by the same lessors of the plaintiff; and with regard to which it appeared that they were held under a different lease, and that at the trial of the ejectment to evict them, the same defence was relied on, the same points made, and a bill of exceptions taken on the same ground of objection as in the principal case. It is now contended, in analogy to the case of a mortgagor making two several mortgages of distinct lands for distinct debts to the same mortgagee, one of them being more valuable than the money due thereon, and the other not, in which case the mortgagor shall not be permitted to redeem the one without the other,* that so in this case the plaintiffs ought not to be permitted to redeem the more valuable lease from eviction, except upon the terms of redeeming the other also. But no authority has been cited to shew that that analogy has been applied to the case of two leases evicted by the same landlord for non-payment of rent; and upon principle, I do not see upon what ground this proposition can be rested,—that the owner of two leases, both evicted for non-payment of rent, cannot save the forfeiture of the one interest without at the same time redeeming the other. The proposition with respect to mortgages has been established after some opposition; and, in my opinion, it would require strong authority to justify the Court in carrying the doctrine to the length contended for. If, therefore, the question had arisen in the present case, I would be inclined to hold that the objection to the relief sought could not be sustained: but the facts of this case do not raise that point; for it appears that the plaintiffs in this suit have not any title to the lands demised by the other lease. Their title is under the will of Thomas Newenham, by which the interest derived under the lease of the New Lotts only is devised to them. It is, therefore, impossible to apply the doctrine respecting the redemption of one of two mortgages to the case before the Court; for we cannot hold that a party entitled to redeem premises demised by one lease, should also be obliged to redeem other property demised by a separate and distinct lease, and to which he has no title.† It, therefore, appears to me, that there is no ground upon which the defence, which has been set up in this case, can be sustained;

* See 1 Pow. on Mortgages, 338, 339.

† See *Jones v. Smith*, 2 Ves. jun. 376.

and that as the rent and costs have been lodged in Court and the bill filed in due time, the plaintiffs are entitled to a decree for the redemption of the premises.

The other question which the Court has to dispose of, regards the costs of the suit. The *habere* was executed on the 2nd of March 1836, and it now appears, unquestionably, that between the execution of the *habere* and the filing of the bill, repeated applications were made on behalf of the plaintiffs to the attorney of the lessors of the plaintiff in the ejectment, to be informed what was the amount of the costs claimed by him; and it is admitted that not only were those applications not complied with, but on the contrary, that they were refused. It has been proved in this cause, that notice of a motion to compel the lessors of the plaintiffs to furnish those costs was served on behalf of the defendant in that action, upon their attorney; and that that motion, when it came on to be moved, was opposed and resisted by the agent for the lessors of the plaintiff, and was refused upon grounds of a technical nature. Again, in June 1836, an application was made to the attorney of the lessors of the plaintiff, for an account of the sum claimed to be due for costs; which was also refused: and on the 29th of August 1836, a tender of the sum of £150 was made on behalf of the plaintiffs in this suit to Mr. Mahon, one of the lessors of the plaintiff; who, it was alleged, was not entitled to receive it, he being merely the assignee of a bankrupt, and there being a receiver of the Court of Chancery appointed over the property. He declined to receive the money; and on the 30th of August a notice was served upon the attorney of all the parties, stating that at twelve o'clock the next day, a person on behalf of the defendant in the ejectment would attend at his office to pay him the rent and costs. That person accordingly went to the office of the attorney, but did not find him there; he, however, afterwards, on the same day, met the latter accidentally in the street, and then made him a formal tender of the sum of £150 as for the rent and costs; which the attorney refused to accept, alleging as one of his reasons for so doing, that the tender was not made in gold. The tender having been refused, and the costs not having been furnished, the present bill was filed, and the sum of £150 was lodged in Court: and it now appears on taxation of the costs, upon the principles contended for by the defendants, that they have been certified at a sum which, together with the sum ascertained to be due for rent, amounts to £147. 14s. 8d. only. Under these circumstances, and there being strong grounds to infer that there was a studied evasion by the lessors of the plaintiff of the just demands of the defendant, in order to prevent him from redeeming the premises, the Court is called upon by the landlord, who has also failed in his defence, to give him his costs of this suit. It would indeed hold out a strong temptation to litigation if the principle were once adopted, that a landlord, no matter how unjust and inequitable

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his conduct may have been, is in all events entitled to his costs of a redemption suit. In this case we are clearly of opinion that he is not entitled to those costs.

Then comes the question, are the plaintiffs entitled to the costs of the suit or against the defendants? With regard to that, it has been urged that the defendants are merely the assignees in bankruptcy of property which is in the hands of the Court of Chancery by its receiver;—that the Court had full right to interfere in the case; and that the defendant could not act without the direction of the Court. But we cannot deal with this case otherwise than as an ordinary case of landlord and tenant; and we must hold the landlord responsible for the acts of those who represent him. It, however, appears that in the ejectment proceedings, no trace of the real title of the plaintiffs in this suit was afforded to the lessors of the plaintiff; on the contrary, the objection made at the trial of the ejectment was, that the heir-at-law of the lessee and not the defendants in the action, was entitled to the property: nor is there any evidence to shew that prior to the filing of the bill, the real title of the plaintiffs in this suit was put forward. There may, therefore, have been some doubt in the mind of the defendants, whether the plaintiffs were the persons entitled to redeem the premises; and although we cannot approve of the conduct of the persons concerned for the landlord, yet, it appearing that there was that doubt as to the title of the plaintiffs, I am of opinion that the plaintiffs are not entitled to the costs of filing the bill.

The bill having been put on the file, the next thing to be considered is, why has the cause been brought to a hearing? As far as I can discover, it is because the defendants have contested the title of the plaintiffs to redeem; and further, have insisted that they should redeem both the premises, or neither. In both these objections they have failed. The will of the lessee has been proved: and so far from there being an obligation on the plaintiffs to redeem both premises, the contrary distinctly appears. Under these circumstances, I am of opinion that the costs of the cause, from the filing of the bill, when the rights of the plaintiffs were fully disclosed, and the order to lodge the money, ought to be paid by the landlords. It is said that there is no precedent for giving the costs of a redemption suit against the landlord. Even if that were so, I do not think that I go too far in saying, that they ought to be given in this case. There are two classes of cases, analogous to the present, in which the defendant, from whom property is sought to be recovered, is, as a general rule, entitled to his costs, although the plaintiff succeed, viz., suits by mortgagors against mortgagees for a redemption; and suits by tenants against their landlords for a renewal of their leases. In those cases, the Court gives to the defendant the benefit of the legal estate vested in him; and, as a general rule, grants relief to the plaintiff, upon payment of the defendant's costs. But it is not an universal rule that the

mortgagee or landlord shall in such cases always have his costs; on the contrary, costs have, in many instances, been given against a mortgagee for misconduct: as in *Harvey v. Tebbutt* (a); *England v. Codrington* (b); *Dryden v. Frost* (c), and *Detillin v. Gale* (d). In that last case, Lord Eldon referred to a case of *Shuttleworth v. Lowther*, in which a mortgagee was made to pay costs on the ground of a tender, and an appropriation of the money, which was paid into the bank and refused. If, therefore, the case of a tenant seeking to relieve himself from a forfeiture is to be argued with reference to the case of a mortgagee filing a bill to redeem, I see no distinction between them, except that the case of a tenant is entitled to more favour; for the Court endeavours to avoid a forfeiture. So in cases of renewals, the landlord is generally entitled to his costs; but the rule is not without its exceptions, to be found in the books; as in *Hill v. Magan* (e), in which Lord Manners held that where there is no doubt as to the tenant's right of renewal, and he is obliged by the refusal of his landlord to file a bill for that purpose, he must have his costs. So also in *Hall v. Smith* in this Court the costs of a redemption suit were given against the landlord. I refer to that case merely to shew that in suits like the present, the rule that the landlord shall get his costs is not universal; and if any excepted cases exist, I think that the present is one of them; and my opinion is, that the plaintiff is entitled to the costs of the suit from the filing of the bill and the lodgment of the money in Court. Much has been said upon the question, whether the right of a tenant to redeem is an absolute right, or in the discretion of the Court. It is not necessary, in this case, to decide that question. It is true that in some cases it has been said that the tenant's right to redeem is as it existed before the passing of the statute, which has only restricted the time for redeeming; but whether the right be imperative upon or in the discretion of the Court, it has now become a matter of settled principle to give to a party, filing his bill and paying the rent and costs into Court within the time appointed by the statute, a redemption almost as a matter of right: and it cannot be said to be a matter so wholly in the discretion of the Court, as has been contended by the Counsel for the defendant.

FOSTER, B.

There is now no question in this case as to the tenant's right to redeem the premises; the only matter in dispute is, whether the landlords are to pay the costs of the suit. It is certainly very unusual to make such a decree in a redemption suit; the general rule being, that the tenant must pay the costs of the suit to the landlord; and that a mere mistake of the landlord as to his rights, shall not disentitle him to costs. But I

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(a) 1 Jac. & W. 197.

(b) 1 Eden, 169.

(c) 3 M. & C. 670.

(d) 7 Ves. 583.

(e) 2 Moll. 460.

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cannot admit that that rule applies to a case where the landlord, without any just cause or pretence, but merely for the purpose of working a forfeiture of his tenant's interest, refuses to accept of the rent and costs, and puts his tenant to the expense of an Equity suit. I know of no principle of equity,—of no decision,—which would lead me to doubt for an instant, the propriety of making the landlord pay the costs of the suit in such a case. It has been urged that in this case, the tenant, as well as the landlord, has misconducted himself. If he did so, and I am of opinion that he did, it was prior to the eviction; and he has suffered the full penalty of his misconduct in having to pay the costs of the proceedings at law. His conduct in the action was antecedent to the circumstances upon which this suit is founded; the transactions connected with it were terminated by the judgment at law; and they form no part of the present proceedings. It appears to me that what the landlord in reality is contending for is, that he be permitted to visit his tenant with vengeance because of the antecedent trouble given him by the tenant: but the Court cannot lend itself to such an object. It has been put forward as an instance of alleged misconduct on the part of the tenant that he does not ask to redeem both the premises which have been evicted. The answer is, that the plaintiffs have no title to redeem the second set of premises, even if they were so disposed, for they are not interested in them: but even if it were otherwise, I know of no coercive rule of equity which says that the tenant shall not, if he thinks proper, abandon one of the premises evicted, and not the other. It is not, however, necessary to decide that question in the present case, for the facts do not raise it. Then it appears that a sum of money exceeding the amount of the rent and costs, as ascertained upon taxation, has been lodged in Court: that it was tendered to the defendants and refused: and that the landlords being called on to furnish their costs to the tenant, in order that he might be enabled to ascertain the sum due, refused to do so; manifestly with the object of oppressing the tenant and preventing a redemption. For the reasons assigned by the Chief Baron, I think that the tenant ought to bear the costs of filing the bill; but as soon as he disclosed his title, there was no excuse for the proceedings of the landlord. I am therefore of opinion that if we have any discretion upon the subject, we ought to decree the costs of the suit from that period, to be paid by the landlord as a matter of right and justice. It is certainly a very unusual thing to make the landlord pay the costs of a suit for a redemption; but such a course is not without precedent; and if we have a single precedent, I think we are bound in this case to follow it. I therefore entirely concur in the judgment of the Chief Baron.

RICHARDS, B.

I am of the same opinion.—Three questions have been raised for the consideration of the Court. First, are the plaintiffs entitled to redeem

the premises? It has been insisted on behalf of the landlord, that although the tenant has lodged in Court upon the filing of his bill within six months after execution executed, a sum of money sufficient to cover the amount of the rent of the premises which are the subject matter of this suit, and costs, yet that as the landlord, contemporaneously with the ejectment for these premises, brought a second ejectment against the same parties to recover other premises demised to the same lessee, the tenant ought not to be permitted to redeem the premises in the one lease unless he also redeem the premises in the other. The facts of the case afford a complete answer to that argument; but in addition I feel bound to say that such a proposition is not to be admitted for a moment. Even supposing that the plaintiffs were entitled to both premises, there is no principle that I am aware of, which would authorise a Court of Equity to say that the tenant shall not be permitted to redeem the one without the other. Another ground upon which it has been contended that the plaintiffs ought to be refused the relief they ask by their bill is, that upon the trial of the ejectment, the Counsel for the defendant in that action made an objection in point of law, and tendered a bill of exceptions to the Judge's charge; and that the objection so made was frivolous and vexatious, because it was afterwards overruled. It is only necessary to state that proposition to see that it cannot be sustained. The tenant has suffered the penalty for making an unfounded objection, by having been adjudged to pay the costs occasioned by it;—the landlord is entitled to receive those costs, and nothing more. By reason of these grounds of defence, unfounded in equity as we must now take them to be, the tenant has been forced not only to file his bill in a Court of Equity, but to bring the cause to an hearing. The second question then is, whether the tenant should, under these circumstances, be compelled to pay the costs of this expensive litigation. It has been strongly argued, first, that the Court has no discretion upon this subject, but is bound to give the landlord his costs. If that be so, it would establish this proposition, that a landlord, once he executes the *habere*, may make whatever defence he pleases to the tenant's claim for a redemption, no matter how unfounded or litigious it may be, with the certainty not merely of not being obliged himself to pay costs to his tenant, but of compelling his tenant to pay him costs. If that were so, the statute deludes the tenant, in telling him that upon lodging his rent and costs he shall have a redemption;—but of what nature? upon paying in addition the costs of both the plaintiffs and the defendants in an Equity suit! Such could not have been the intention of the Legislature. Then it is said, that at least, if the landlord is not to be paid his costs, he is, at all events, and as a matter of right, not bound to pay them: that there is no jurisdiction in a Court of Equity to make the landlord pay costs. Upon that point I do not mean to express any opinion, with reference to the costs of filing the bill, and of obtaining the

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order to lodge the rent and costs. Possibly the act of Parliament may admit of this construction, that where the tenant suffers the *habere* to be executed, it is obligatory upon him to file a bill and lodge the rent and costs in order to save his interest. In this case I think that the tenant ought not to have the costs of the bill or of the order to lodge the money; but with reference to the subsequent costs in the cause, I cannot understand upon what principle a landlord is privileged to force the cause to a final hearing, upon such a defence as I have mentioned, and then tell the tenant that though he has succeeded, he shall nevertheless be at the expense of doing so. If the Court were to yield to such a doctrine, it would open a door to the grossest oppression; almost as gross as if the tenant were in every case bound to pay the landlord his costs. The third question is, whether we can award costs to the plaintiffs. Now unless the act of Parliament has excluded the jurisdiction of the Court, we ought not to surrender its inherent right to adjudicate upon the question of the costs of the suit. It is, in almost every case, one of the most important and most anxious questions which comes before it; and the Court has always exercised a jurisdiction to award costs according to the justice or injustice of the case and the defence. [The learned Baron then stated the several notices in the case.]—It is sought to embarrass the tenant by the embarrassments of the landlord; but this Court will not permit that to be done. If the assignees make themselves lessors of the plaintiff in the suit at law, they must be bound by the consequences of their act; and cannot put the tenant to the additional expense of obtaining an order of the Court of Chancery that the assignees should receive the rent and costs from him, because it happens that a receiver has been appointed over their property by that Court. It appears to me, therefore, that the notice of the 30th of August 1836 was served to embarrass and defeat the just rights of the tenant. Again, the notice of the 1st of September 1836 informs the tenant that the receiver could not interfere further without an order of the Court. So it is to be expected that the tenant shall be obliged to apply to the Court for an order on the receiver to receive the rent and costs! If the receiver conceives that he cannot receive them without the order of the Court, it is his duty to apply for it, although I must say that, in my opinion, the Court would say that he had made a very useless application. That, however, was a question between the receiver and the Court—the tenant had nothing to do with it. We find then that repeated applications on behalf of the defendant in the ejectment cause, were made before the filing of the bill to J. S. Molloy, to furnish the costs in that action; which the defendants in their answer swear they believe were refused, because Molloy was under the impression that such requests were made, not with the object of redeeming the premises, but for the purpose of embarrassing the receiver. The cause came on to be heard in May 1839, when the Court

ordered that the costs should be furnished and taxed. After much vexatious proceedings and delay, they have been taxed; and the sum lodged in Court has been ascertained to be sufficient. I am, however, very far from saying that had it been insufficient, the plaintiff would, under the circumstances of this case, have been barred of his right to redeem the premises. In my opinion, therefore, the plaintiffs are entitled to the costs of the suit from the filing of the bill. *Swanton v. Biggs* is a case very much to be respected and followed. There the Lord Chancellor says that it was the object of the Legislature, *if the tenant complied with the provisions of the act*, to give him speedy repossession of his tenement. The statute is imperative in this sense, that it is the plain equity of the tenant to be relieved upon complying with its provisions; and the Court is bound to relieve him upon that equity as upon any other plain equity. The usual decree for a redemption must be pronounced; the plaintiff to have the costs of the cause subsequent to the order to lodge the money in Court, but no costs of that order or of filing the bill; and reserve the costs of the account until the final hearing.

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FITZGERALD v. HUSSEY.*

THE plaintiff, Fitzgerald, held a house and demesne from the defendant; and the rent being in arrear, an ejectment on the statutes was brought, in which judgment was had and an *habere* was executed on the 18th of November 1824. On the 18th of May 1825, being the last day of the six months allowed by the statute for redemption, the present bill was filed. It stated the demise of the lands; the rent being in arrear; the ejectment, judgment, and *habere*; and "that the said *habere* was executed "on or about the 18th day of November 1824, and possession was on "that day taken of the said house and demesne." It then stated an offer to pay the rent to Hussey, and an actual tender to his attorney at law;—offered to bring in the rent;—and prayed an injunction upon the usual terms.

The defendant by his answer admitted all the material allegations of

The bill charged that the *habere* was executed "on or about the 18th of November, "and possession was on that day taken." The answer stated, "that it is not true, as "in bill untruly stated, that said *habere* was executed on the 18th of November; for that "defendant believed that it was executed on the 17th of November:"—*Held*, that the precise day of the execution of the *habere* was sufficiently put in issue.

Acts of waste committed by a tenant do not disentitle him to redeem.

Decree for a redemption without costs; the landlord having, within the six months, refused a tender of the rent and costs of the ejectment.

1826.
Nov. 9, 16.

To an *habere* upon a judgment in ejectment for non-payment of rent, the sheriff returned that he had delivered possession upon a particular day:—*Held*, in a redemption suit, that the return was not conclusive evidence, against the tenant, of the date of the execution of the *habere*.

* For the note of this case, the Editor is indebted to G. B. Hickson, Esq. It is introduced here, as being in connexion with the subject of the two last cases.

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the bill, except the date of the execution of the *habere* :—"saith it is "not true, as in bill untruly stated, that said *habere* was executed on "the 18th day of November 1824; for this defendant believes that said "*habere* was executed on the 17th day of November 1824: and as evi- "dence thereof, this defendant refers to the said *habere* and the return "of the sheriff thereon, duly filed, by which it appears, according to the "truth and fact as this defendant believes, that said *habere* was executed "on the 17th and not on the 18th of November 1824: and this defend- "ant does insist that the complainant has no right to redeem said house "and demesne." In another passage of the answer,—“this defendant "saith that it appears from an attested copy of the plaintiff's bill, that "same was not filed until the 18th day of May 1825, and it also appears "from the return of the sheriff, endorsed on said writ of *habere*, that "same was executed on the 17th day of November 1824; and this "defendant therefore insists that said bill was not filed within the time "required by the statutes, and that plaintiff is barred from having any "redemption of said house and demesne; and this defendant relies on "this as fully as if he had pleaded same."

Mr. *Pennefather* stated the plaintiff's case.—The entire question between the parties is,—Is the sheriff's return conclusive as to the time of the execution of the *habere*? I admit it to be conclusive as between these parties, as to the fact of possession having been taken. That cannot now be disputed: but neither the common law nor any statute requires the sheriff to return the precise day or time on which he executed a writ of *habere*, or any other writ. His return therefore as to time, is a return of a collateral fact; which is only *primâ facie* evidence, liable to be rebutted by contrary evidence: and it is but reason that it should be so. All the authorities establish this: I shall rely on the case of *Gyfford v. Woodgate* (a), the marginal note of which does not state correctly the precise point decided. He then read the case; and the Court called on

Serjeant *Blackburne*, for the defendant: who submitted that on every principle of policy, public convenience, and quieting of titles, the plaintiff's bill ought to be dismissed. It is the first attempt, since the passing of the ejectment statutes, of the kind. Landlords, and all those dealing with them and deriving under them, have relied on the sheriff's return as giving an unimpeachable title: and although the ejectment statutes do not, in terms, direct the sheriff to return the precise day of the execution of the *habere*, yet ever since the passing of those statutes, such has been the form of the return; and until now, it has always been considered material and conclusive: and there is not a single instance on record, from the passing of the acts, in which the time of the execution of the

(a) 11 East, 297.

habere has not been returned as in the present case.—[COURT. Does the sheriff, when he executes an *habere* on an ejectment on the title, return the time of the execution.]—No;—nor is it necessary that he should.—[COURT. Does the form of the *habere* in ejectment for non-payment of rent differ from that in an ejectment on the title.]—I believe not.—[PENNEFATHER, B. We have called for an attested copy of the writ of *habere* in this case, and have examined it to see whether time forms any part of the panel of the return which the sheriff ought to make; and the writ has these words,—“and in what manner you shall have executed “this writ.”]—Mr. *Pennefather*. That is the language of every writ.—[PENNEFATHER, B. Precisely. I do not think those words make time an essential part of the return.—M'CLELLAND, B. How is the sheriff to distinguish between an *habere* in an ejectment for non-payment of rent, and an ejectment on the title?]—Mr. *Blackburne*. By the information of the party.—[M'CLELLAND, B. I cannot consider this return conclusive evidence of the time of the execution of the *habere*.]—At law it would be clearly conclusive.—[COURT. How do you shew that? If conclusive at law, it must be equally conclusive in equity. We will not establish a rule of evidence, sitting as a Court of Equity, which, sitting as a Court of Law, we would reject. The rules of evidence are substantially the same at law and in equity. What do you say to the case of *Gyfford v. Woodgate*? Have you any case over-ruling or varying that case; or any case denying the principle, that on a collateral matter, not an essential part of the return, and which the sheriff is not by the writ commanded to return, the sheriff's return is only *prima facie* and not conclusive evidence?]

Mr. *Blackburne* did not state any case.

Mr. *O'Connell*, at the same side, submitted, that on those pleadings the sheriff's return was conclusive in all its parts; and that evidence to impeach it ought not to be admitted. This Court had repeatedly over-ruled *Gyfford v. Woodgate*, more especially in the case *Lessee Henchy v. ———*, which came before the Court after verdict at the Clare Assizes. If the plaintiff meant in any manner to impeach the return, he ought, upon the coming in of the answer, to have amended his bill, charging distinctly the fact of the execution of the *habere* on the 18th, and charging combination between the sheriff and the defendant: and by these means give the defendant an opportunity of rebutting those charges, and examining witnesses to shew that the return was true in substance and in fact. This could have been done completely; but on the pleadings as they now stand, the defendant is taken quite by surprise, if this evidence be let in. Is there on the pleadings any thing to shew that the plaintiff intended to impeach the truth of the sheriff's return as to time? He does not, even by his bill, state that the *habere* was actually executed on the 18th; the words of the bill are, “on or about the 18th.”

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This is clumsy pleading, and much too loose to put the precise day in issue.

Mr. *Hickson*, for the plaintiff.—I mean to insist that on those pleadings, nothing but the precise day is or could be in issue between the parties.—[COURT. Let us see what is in issue: read the charge in the bill and the answer thereto.]—The paragraph in the bill and answer, *ut ante*, were then read.—[COURT. We think that the time of the execution of the *habere* is sufficiently in issue.]

Mr. *O'Connell* then argued that at law the plaintiff was concluded by the time in the return; and that *Gyfford v. Woodgate* had been overruled by this Court; and again cited *Lessee of Henchy v. —*

The COURT then directed the evidence of the time of the actual execution of the *habere* to be read: and then offered the defendant's Counsel an issue to try the fact of the precise day of the execution of the *habere*. The Counsel for the defendant hesitated, as the defendant was not present. The Court said they would not pronounce any decree until Counsel had an opportunity of communicating with the defendant.

Mr. *O'Loghlen*, for the defendant, submitted that the plaintiff was a defaulting tenant, who was not, from the circumstances of the case, entitled to any favour. He had committed the grossest waste, and had dilapidated the house, which in itself ought to disentitle him to redemption.—[COURT. No. We have lately determined that that does not disentitle a tenant to redeem.]—The case of *Dowling v. Foxhall* (a) is the first in which it was held that the day on which the *habere* was executed is not to be included in the calculation of the six months. Now, in this case, the bill was not filed until the 18th of May; and admitting that the *habere* was not executed until the 18th of November, if as against this tenant, not deserving of any favour, the Court departs from the decision in that case, justice will be done to all parties.—[COURT. We will not overrule that case.]

On a subsequent day, the defendant, by his Counsel, declining an issue, the Court decreed the plaintiff entitled to redemption on the usual terms, and gave no costs on either side. Mr. *Bennett* and Mr. *Hickson* were with Mr. *Pennefather* for the plaintiff.

The decree was prefaced thus—"The said P. B. Hussey declining to "accept an issue as to the fact, to ascertain on what day particularly the "writ of *habere facias possessionem* in the pleadings in this cause mentioned was actually executed."

(a) B. & Beat. 193.

* See *Bodkin v. Vesey*, 1 Jo. 139; *Chambers v. Bernasconi*, 1 Tyrw. 335.

HODGENS v. WHEELER.

(In the Rolls.)

1841.
Rolls.

Jan. 20.

On the 3rd of July 1840, Mr. Murphy, who was the late solicitor of Mrs. Hodgins the plaintiff in this cause, obtained an order to impound for costs the dividends payable to her on certain funds in Court. By another order of the same day, on the motion of Mrs. Hodgins, the costs were referred for taxation, and Mr. Murphy was ordered to procure a report on or before the 1st of November then next.

The report was not obtained within the time limited, and on the 10th of November 1840, Mrs. Hodgins obtained a further order discharging the impounding order of 3rd of July, and releasing the dividends payable to her in the present month.

Mr. Blake, Q. C., for Murphy, now moved to discharge the order of 10th of November 1840, upon the ground that the bill of costs had been furnished to Mrs. Hodgins, and that if she desired to have it taxed it was her duty to advance the sum payable to the Chancery fund upon the bill before taxation, but she had declined to do so.

Mr. Litton, Q. C., and Mr. B. C. Lloyd, for the plaintiff, insisted, that the solicitor is bound to advance the sum payable to the Chancery fund on a bill to be taxed, and that the only exception to such rule is where the solicitor is insolvent. They cited *Blythe v. Davies* (a); *Mahony v. Dillon* (b).

MASTER OF THE ROLLS.

I have had occasion to consider this point before, and was then, as I still am, clearly of opinion that the sum payable to the Chancery fund on a bill to be taxed must be advanced by the solicitor in the first instance. It is a settled proportion of the sum claimed for costs. If upon inquiry it appears that the bill is a proper one, and such as the client had not very sufficient reason for objecting to, the solicitor will be entitled to have his costs of the taxation, of which the sum paid to the Chancery fund is one item, included in the sum certified to be due to him on foot of the bill. But on the other hand, having regard to the principles upon which this Court acts, I have held in several cases, some of which have been before me very recently,* that where a solicitor's bill is ascertained by taxation to be unjust, he must bear all the costs rendered necessary by the unreasonableness of his demand. I am therefore of opinion, that the proper person to advance the sum payable to the Chancery fund, is the solicitor who furnishes the bill.

Motion refused, with costs.

(a) *Crawf. & Dix*, Ab. N. C. 223.

(b) 1 Hog. 292.

* See the cases of *Lawlers, Minors*, and *Power v. Nagle*, ante, pp. 102-105.

A solicitor must advance the sum payable to the chancery fund on a bill of costs referred for taxation; but he will be entitled to have it and his other costs of the taxation included in the sum certified on foot of the bill, in case it is not reduced by more than one-sixth. If more than one-sixth be struck off, he must bear all the costs of the taxation, the clients' as well as his own.

1841.

*Rolls.*COMMISSIONERS OF CHARITABLE DONATIONS AND
BEQUESTS

v.

RICHARD ESPINASSE and JANE his Wife.

Jan. 21.

Testatrix devised all her freehold and leasehold estates to A. for life, remainder to B. for life, remainder (except as to a certain rent) to the Commissioners of Charitable Donations and Bequests, upon trust to renew leases and apply rents, &c., and appointed A. and B. executors of her will:—*Held*, that A. and B. took beneficial estates respectively for life.

The Commissioners filed a bill against A. and B., seeking for a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix, and all her personal estate and effects, &c., and praying that an account might be taken of her freehold and leasehold estates, &c., and that the title deeds relating thereto

might be brought into Court. The bill did not state that the personal assets of the testatrix were insufficient for the payment of her debts, but it averred that the defendants had paid a specific bequest in her will mentioned.

Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real), allowed.

THE bill in this cause stated that Miss Cordelia Carey, of Stephen's-green, in the city of Dublin, being seized and possessed of considerable freehold, leasehold, and *personal* estate, duly made and published her last will and testament in writing, bearing date the 21st of August 1832, and executed and attested, &c., to pass real estate, and thereby "devised and bequeathed all the estates which she was seized of or entitled to, "whether fee-simple or freehold, and all her terms of years of which "she was then possessed, or at the time of her death might be possessed, unto Richard Espinasse for life, with remainder (except a "certain rent chargeable and payable out of the lands of Bascay, in the "county of Dublin) to the Commissioners of Charitable Donations and "Bequests, and to their successors for ever, in trust, to pay the head-rents as they should respectively become due, and to renew the several "leases under which said property is held, within six months after the "fall of each life, and to apply the issues and profits thereof annually" for certain charitable purposes therein mentioned. That after giving various other charitable bequests, the testatrix directed *the remainder of the issues and profits of said estates* to be applied (save and except the sum of £20 out of the first year's income, which was to be paid to the Parochial Schools of St. Peter's, Dublin) to certain charitable institutions mentioned in the bill. That by a codicil to her said will, she gave and devised her estate and interest in five shares in the Dublin Cemetery Company to the Rector of St. Catherine's Parish, upon certain trusts, and appointed the said Richard Espinasse executor of her said will and codicil during his life, and, after his death, said defendant Jane Espinasse executrix thereto. That the testatrix died without altering or revoking her said will, save by the said codicil, and that said Richard Espinasse duly proved the same and obtained probate thereof, and entered into possession of the lands therein mentioned; and duly transferred the shares in the Cemetery Company to the Rector of St. Catherine's parish.

That the plaintiffs, being apprehensive that the title deeds might be mislaid, or the estates lost for want of renewal of the leases, caused their solicitors, Messrs. M'Causland and Fetherstone, to write to the said Richard Espinasse, requiring him to inform them of the particulars of the estates devised by Miss Carey for charitable purposes, and whether he had all or any of the several title deeds relating to the same. That on the 21st of February 1839, the said defendant wrote and sent the following answer to Messrs. M'Causland and Fetherstone :—

"Sirs—In compliance with your request, I have to inform you that the only information I can give you of my actual knowledge as to the estates of the late Miss Carey, is, that she was seized of no estates in fee-simple or *fee-tail*, but was entitled to an estate in Rainsford-street and Lord Meath's Liberty, Dublin, under a lease with a covenant for renewal."

After stating other applications to the defendants Espinasse and wife, the bill further stated that the defendant Richard refused to comply with such requests, pretending that the said Cordelia Carey was seized of no estate in fee-simple or *fee-tail*; whereas the plaintiffs charged the contrary of such pretence to be true, and that the said Cordelia Carey was seized of estates in fee-simple and in *tail*. And the bill contained, amongst others, the following interrogatory :—"Did not said Richard Espinasse, as such executor, possess himself of all or some and what part of the personal estate and effects of the said Cordelia Carey of the particulars aforesaid, or of some other and what particulars, or how otherwise?"

The bill prayed that the said defendant Richard Espinasse might set forth a full, true, and particular account of all and every the rents, issues, and profits of the estate and effects belonging to the said testatrix at the time of her death, together with the nature, kind, quantity, quality, true and utmost value thereof, and of every part thereof, and where and in whose hands the title-deeds, &c., now were; and that the said defendants Richard and Jane, or one of them, might be decreed to give an account to the plaintiffs, or to such new trustees as the Court should think fit to appoint, of all the real, freehold, and chattel estate of the said testatrix bequeathed for charitable purposes, and the yearly amount of the same separately, and into whose hands same came, and how same and every part thereof had been disposed of; and that all deeds, &c., should be given into the custody of a trustee, or be lodged with one of the Masters of the Court; and in case the Court should be of opinion that the said charitable donations should be paid in the lifetime of the defendants, according to the true construction of said will, then that same might be decreed to be paid accordingly; and that all accounts necessary for that purpose might be taken; and if necessary, that the defendants might be removed from said trusts, and new trustees appointed.

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To so much of the foregoing bill as sought discovery of estates tail of the testatrix, and of her personal estate and effects at the time of her death (except chattels real, and the shares in the Dublin Cemetery Company), and of the profits and true and utmost value thereof; and also as to so much of the said bill as sought discovery whether the defendant Richard possessed himself of all or some, and what part of the personal estate and effects of the said Cordelia Carey (except chattels real and shares in the Dublin Cemetery Company), and of what particulars the same consisted, the defendants demurred generally for want of equity, and answered the rest of the bill. In the answer was contained the following passage:—"And these defendants admit that Messrs. M'Causland and Fetherstone, the plaintiffs' solicitors in bill named, wrote such letters to these defendants as in said bill mentioned and set forth, and that this defendant wrote and sent such answers to said letters as in said bill also mentioned and set forth, and that such letters and answers were of the date, purport and effect respectively as in said bill mentioned."

Mr. J. C. Lowry, for the demurrer.—Miss Carey has not made any disposition of her personal estate, except her terms for years, and her shares in the Dublin Cemetery Company, for charitable purposes. She devised all her freehold and leasehold estates to the defendant Richard Espinasse for life; remainder to his wife, Jane Espinasse, for life; remainder (except as to the lands of Bascay) to the Commissioners of Charitable Donations and Bequests and their successors for ever, upon the trusts in the will stated. Under the 40th G. 3, c. 75, s. 2, the Commissioners are empowered to sue for the recovery of charitable donations and bequests which are withheld, concealed, or misapplied; and even if it should be admitted that they are entitled to call for discovery of the freehold and leasehold estates of the testatrix during the lifetime of Mr. and Mrs. Espinasse, they can have no right to a discovery of the personal assets in which they have no interest, and in respect of which no relief is prayed. Therefore, to so much of the bill as seeks such discovery, the defendants have a right to demur: *Mitf. Pl.* 191-2; *Story Eq. Pl.* 346; *Hare on Discovery*, 5, 161; *Cardale v. Watkins* (a); *Wigram on Discovery*, 166. Even if this were a mere money fund for payment of debts and legacies, the case made by the plaintiffs would not entitle them to an account: for the bill states that the defendant Richard Espinasse transferred the shares in the Cemetery Company to the Rector of St. Catherine's Parish, to whom they were specifically bequeathed for certain charitable purposes. That was a clear admission of assets sufficient to pay both debts and legacies; and such admission to one legatee is an admission to all: *Cooke v. Martin* (b). Where an executor admits assets sufficient to

(a) 5 Mad. 18.

(b) 2 Atk. 3.

satisfy the plaintiff's demand, it is improper to put the estate to the needless expense of an account (a).

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Mr. *Blacker*, Q. C., and Mr. *J. Radcliffe*, for the plaintiffs.—Upon the true construction of the will of Miss Carey, the defendants *Espinasse* and wife are mere trustees of the devised estates for the charitable purposes stated in the will. The testatrix devised her estates to Richard *Espinasse* for life, remainder to Jane *Espinasse* for life, remainder to the plaintiffs *upon trust*, &c.; and the first trust which is declared, is “to renew the leases under which such estates are held *within six months after the fall of each life* ;” thereby clearly shewing that the intention of the testatrix was, that the defendants should be mere trustees for the charitable purposes of the will. Therefore, the rents were immediately applicable to the charities, and any deficiency should be made good out of the general assets. At all events, the demurrer is informal; it does not specify with precision the parts of the bill to which it means to object, so as to enable the Court at once to apprehend the precise nature of the objection; and it must therefore be overruled: *Crampton v. Alexander* (b). This demurrer is also overruled by the answer: for, the bill sets out a letter from the defendant Richard *Espinasse* to the plaintiffs' solicitors, in which he states that the testatrix was not seized of any estates in fee-simple or fee-tail; and although the defendants demur to so much of the bill as seeks any discovery whether the testatrix was seized of any estates tail, they have admitted in their answer that the defendant Richard wrote the letter stated in the bill. They thus give part of the discovery to which they have demurred, and the demurrer is overruled.—The following cases were also cited: *Chetwynd v. Lindon* (c); *Johnston v. Johnston* (d); *Devonsher v. Newenham* (e); *Robinson v. Thompson* (f).

Mr. *Hunter*, in reply, cited *Francis v. Wigzell* (g).

The MASTER OF THE ROLLS, after adverting to the statements and prayer of the bill, and stating at length the causes of demurrer, now delivered his judgment to the following effect:—

Jan. 26.

The plaintiffs resist this demurrer upon two grounds: first, they say, that it does not shew with sufficient certainty what parts of the bill it refers to; and, second, that the defendants Mr. and Mrs. *Espinasse* take

(a) See the cases of *Enraght v. Fitzgerald*, 2 Ir. Eq. Rep. 87; and *Bennett v. Fowler*, 2 Beav. 302.

(b) *Sausse & Co.* 297.

(c) 2 Ves. sen. 450.

(d) 2 Mol. 414.

(e) 2 Sch. & Lef. 199.

(f) 2 Ves. & B. 118.

(g) 1 Madd. R. 258.

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no beneficial interest under the will, at least in the freehold and leasehold premises ; that therefore, the rents and profits of those estates should now be paid as far as they will extend, on account of the charitable bequests in the will mentioned ; and that the deficiency, if any, should be made good out of the general assets of the testatrix. In support of the first objection the case of *Crampton v. Bishop of Meath* (a) has been relied upon, but in my opinion it does not apply. There, the plaintiff demurred generally to several parts of the plaintiff's bill ; and amongst others, to so much of it as sought to compel him to make discovery of any waste committed or permitted by him upon the premises. There were several charges in the bill relating to waste and dilapidation, and the demurrer did not specify to which of them it referred. It is well settled that a demurrer to part of a bill must clearly point out the parts or part demurred to ; but, in the present case I cannot see how the defendants could have more clearly shewn the parts demurred to than they have done.

Upon the second objection my opinion is also in favour of the defendants. I think they are respectively entitled to beneficial estates for life in the freehold and leasehold premises devised to them. The testatrix devised all those estates to the defendant Richard Espinasse for life ; remainder to the defendant Jane Espinasse for her life ; remainder—*except as to the lands of Bascay*—to the Commissioners of Charitable Donations and Bequests. Thus a distinction is made between the devise to the defendants and the devise to the plaintiffs : a portion of the estates devised to Espinasse and wife respectively for life, is expressly excepted from the devise to the Commissioners ; and it is also to be observed, that the trust for the charities is not declared until after the limitation of the estate in remainder to the Commissioners of Charitable Donations and Bequests. Of course I must take the will as it is pleaded, and I think that as pleaded the effect of the devise to Mr. and Mrs. Espinasse is such as I have stated.

It is, I think, a mistake to suppose that the demurrer in this case is overruled by the answer. The demurrer, it is said, objects to discovery of estates tail of the testatrix, and the answer admits a letter written by the defendant Richard Espinasse, in which it is stated that the testatrix was not seized of any estate tail. That is an admission of the document referred to, but could not, I think, be properly considered as giving any part of the discovery as to estates tail of the testatrix required by the bill.

Demurrer overruled.

(a) Sausse & Sc. 297.

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JOHN O'LEARY, Plaintiff;
MARY PURCELL, JANE PURCELL, ANNE
PURCELL, and ELIZABETH FEUGE, a Lu-
natic, by RICHARD FEUGE, her Committee, Defendants.

Jan. 23.

THIS was a motion on behalf of the defendants Mary Purcell, Jane Purcell, and Anne Purcell, that the plaintiff should pay to them the sum of £827, in the order of the 25th of June, and recognizance of the 13th of August 1840, mentioned, as and for *mesne rates of the lands and premises in the pleadings mentioned*, according to the true intent and meaning of the said order and recognizance; or for such other order, &c.

The bill in this cause prayed specific performance of an agreement for a lease of the lands of Templemany, in the county of Cork, and an injunction to restrain the defendants from proceeding in an action of ejectment brought by them to recover possession of those lands or any part thereof, and from issuing or executing an *habere*, &c. An injunction until answer having been obtained *ex parte*, on the filing of the bill, afterwards, on the 25th June 1840, the plaintiff moved to continue it to the hearing, upon equity confessed, in the answer of the defendants Mary, Jane, and Anne Purcell; and the Master of the Rolls was pleased to grant the motion, upon the terms of the plaintiff giving a consent for judgment in the ejectment within two days; and also, within two months from the date of the order, giving security by recognizance, with two sufficient sureties, in the sum of £827, being the sum stated by the said defendant's answer filed the 26th of May 1840, to be due for *rent up to and including the 1st of May last*, and paying half-yearly, within two months from the 1st of May and 1st of November in each year the annual sum of £352, the first payment to be made within two months after the 1st of November next: the plaintiff undertaking to cultivate the said lands in a husband-like manner, and not to do or permit any waste thereon. And by consent of the parties, it was further ordered that the plaintiff should file a replication within one week; and that thereupon both parties should proceed to examine their witnesses, and that publication should pass on the 11th of October then next, and that this cause should be set down to be heard in the then next Michaelmas Term, and that both parties should

Bill for specific performance of an agreement to grant a lease, and for an injunction to restrain execution of an *habere*. On the coming in of the answer, the injunction was continued to the hearing, on the terms, amongst others, of the plaintiff giving security by recognizance "in the sum of £827, being the sum stated in the defendant's answer to be due for *rent up to and including the 1st of May last*." A recognizance reciting the order, and purporting to be in pursuance of it, was entered into, but by mistake it was conditioned, "If the said J. O'L. (the plaintiff) shall well and truly account (&c.) for *mesne rates*, and well and

"truly pay (&c.) such sum as shall be decreed for the said *mesne rates*," then the recognizance to be void. Afterwards the bill was dismissed with costs, and the plaintiff having become insolvent, the Court (for the purpose of enabling the defendants to proceed against the sureties for the sum of £827 upon the recognizance) ordered that the plaintiff should within one month pay the said sum of £827 in the injunction order and recognizance mentioned, as and for the *mesne rates of the lands in the pleadings mentioned*, and in default of such payment, that the defendants should be at liberty to sue on the recognizance without further order.

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appear at the hearing without service of subpoena: and it was further ordered, that in default of the aforesaid terms being complied with, the injunction should be dissolved.

In pursuance of the foregoing order, a recognizance was made and entered into on the 13th of August 1840, for the sum of £827, by the plaintiff, and the Rev. David O'Leary and John O'Connell as his sureties. This instrument was prepared by the plaintiff's solicitor, and was approved by the Master, without notice to any of the defendants in the cause. In the condition was recited the order of the 25th of June 1840, restraining the defendants from proceeding to issue any writ of *habere*, &c., upon the terms of the plaintiff speeding his cause, and giving a consent for judgment in the ejectment; "and upon the further terms of "the plaintiff giving security by recognizance, with two sufficient sureties, "in the sum of £827, being the sum stated by the said defendants' answer "to be due for rent up to and including the 1st of May last;" and it was then declared, "That if the said John O'Leary do and shall well and "truly account, in such manner as the Court shall order or direct, for "the *mesne rates* of the lands and premises in the pleadings in said "cause mentioned, and shall well and truly pay or cause to be paid, to "such person or persons as the said Court shall direct, *such sum or sums* "as shall be decreed or ordered for the said *mesne rates*, that then the "foregoing recognizance be null and void; otherwise," &c.

One of the sureties in the recognizance was examined as a witness for the plaintiff in the cause; and amongst his depositions was the following:—"If the plaintiff fails in this suit, I shall be liable to pay to the "defendants Mary, Jane, and Anne Purcell the sum of about £823, "under and by virtue of a recognizance mentioned in my answer to a "former interrogatory," viz., the recognizance of the 13th of August 1840.

The cause was heard by the Lord Chancellor on the 23rd of November 1840, when the bill was dismissed with costs as to the defendants Elizabeth Feuge and Richard Feuge, and the cause was ordered to stand over as to the defendants Mary, Jane and Anne Purcell, until the first hearing day of the then next Term, on the terms that the plaintiff should, within one month, pay to the last named defendants the sum of £1003, for rent then due; and in default of such payment within the time limited, that the bill should stand absolutely dismissed with costs, without further order.

The plaintiff having become insolvent, and having failed to pay any part of the said sum of £1003 within the time limited, his bill was absolutely dismissed with costs: and the object of the present application was, in effect, to re-form the condition of the recognizance according to the intention of the parties, so as to enable the defendants, upon the breach of it, to recover from the sureties the sum of £827 upon the recogni-

zance. The plaintiff and his sureties were served with notice of the motion, but they did not appear upon it.

Mr. *Collins*, Q. C., and Mr. *Berkeley*, for the motion.

A miscarriage in the Master's office has rendered the present application necessary. The recognizance which the Court was pleased to order for the defendants' security was prepared by the plaintiff's solicitor, and was approved by the Master, without notice to any of the persons for whose security it was ordered; and it now turns out that it is made to depend upon a condition at variance with the order which it recites, and the plain intention of the parties—rendering the recognizance a dead letter, unless the Court will be pleased to grant the present application. There can be no doubt, that notwithstanding the dismissal of the bill, the Court has jurisdiction to make such an order on the plaintiff as is now sought for: *Costello v. Hunt* (a); *Popham v. Baldwin* (b); *Lord Arlington v. Merricks* (c); *Spye v. Topham* (d); *Vin. Abridgm. tit. Obligation, Pl. 42*; *Watts v. Pitt* (e); *Sheppard Touchst.* 87.

MASTER OF THE ROLLS.

After stating at length the above-mentioned facts of this case, his Honor proceeded to pronounce judgment upon it to the following effect:—

The first question which arises for decision on this motion is, whether after the plaintiff's bill has been dismissed at the hearing, I have jurisdiction to make any order upon him, touching the recognizance which he and his sureties entered into in the cause pursuant to an order of the Court? I have no doubt that the Court retains jurisdiction to make such an order after the bill has been dismissed; but I think the more regular course for the defendants should have been, to have obtained an order or direction upon the hearing of the cause, by which the necessity of a further application would have been avoided. In the cases of *Costello v. Hunt* and *Popham v. Baldwin*, cited by Mr. *Collins*, the Court of Exchequer held, that where the plaintiff had obtained an order continuing to the hearing of the cause an injunction restraining proceedings in ejectment, on the terms, amongst others, of his giving security by recognizance for payment of mesne rates, the Court retained jurisdiction, after the bill was dismissed, to make an order upon him to pay the sum found to be due for mesne rates, so as to enable the defendant to proceed at law against the sureties, in case of the plaintiff's default in not paying such sum pursuant to the order.

(a) 2 Ir. Eq. Rep. 357, n.

(b) 2 Ir. Eq. Rep. 356.

(c) 2 Saund. 411.

(d) 3 East, 116.

(e) Lutw. 441.

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In almost every cause there are incidental and collateral matters, which could not possibly be disposed of or determined by the mere dismissal of the bill. In *Wright v. Mitchell* (a), the creditors of an intestate filed a bill to set aside a lease made by him, and after the tenants had paid their rents into Court, the bill was dismissed for want of prosecution. The assignees of the lease then moved that the money which had been lodged in Court should be paid out to them, and Lord Eldon, after full consideration made the order. So in *Pitt v. Bonner* (b), which was a suit for specific performance instituted by a purchaser against a vendor, a receiver was appointed, and afterwards the bill was dismissed with costs at the hearing. After dismissal of the bill, the Court ordered that the receiver should account and pay over his balance to the defendant.* In bankruptcy, in like manner, the jurisdiction continues for many purposes after the commission has been superseded: *Ex parte Fector* (c); *Ex parte Cowan* (d). So, the authority of the Lord Chancellor in lunacy is not determined as to all matters by the death of the lunatic: *Ex parte M'Dougal* (e).

All those cases, I think, shew, that notwithstanding the dismissal of the bill, the Court may, in a case like the present, make an order on the plaintiff touching his recognizance; and the remaining question is, whether I ought to make such an order upon him as that which has been applied for.

No one reading the order pronounced by this Court on the 25th of June 1840, could have the least doubt as to its meaning, nor that the recognizance it required was one that should secure the ascertained sum of £827—which was declared to be “the sum stated by the answer “of the defendants, filed the 26th of May 1840, to be due for rent up “to and including the 1st of May last,”—and not the unascertained amount of profits accruing from the day of the demise in the ejectment. The order in fact distinguished between the two: as to the sum of £827 stated to be due for rent up to and for the 1st of May, it required the plaintiff to give security by recognizance with sureties; and as to the profits accruing pending the cause after the said 1st of May, that he should pay half-yearly within two months from every 1st of May and 1st of November the annual sum of £352—the first payment to be made within two months after the 1st of November. In the recognizance, the order of the Court is correctly recited; but the condition, instead of following the

(a) 18 Ves. 292.

(b) 5 Sim. 577.

(c) Buck's Ca. 428.

(d) 3 Bar. & Ald. 126.

(e) 12 Ves. 384, and see *In re Earl of Kingston*; 2 Ir. Eq. R. 169. As to the general question respecting the jurisdiction, see the note to *Hutchins v. Hutchins*, ante, p. 221, *et seq.* See also the case of *Duffield v. Elwes*, 2 Beav. 268.

* See *Belagh v. Concannon*, Ll. & Go. temp. Plunk. 360.

terms of that order, is for payment of *mesne rates*. It is clear that the injunction was to be continued upon the terms of security being given by recognizance for the sum of £827 on account of rent up to and for the 1st of May 1840—that the defendants were entitled to have such security as one of the terms upon which the injunction should be continued against them: and, it is equally clear, that, although the instrument intended as such security (by an oversight in the Master's office, for which it is difficult to account, and which, I hope, will not occur again) is informal, the parties to it obviously meant to comply with the order of the Court, and to fulfil the terms upon which the injunction was to be, and in fact was, continued. Under such circumstances I could not construe the latter part of the condition of the recognizance without having regard to the former part of it, in which the order of the Court is recited; and I may observe that the words *mesne rates* do not necessarily mean the profits accruing from the day of the demise in the ejectment. What we term *mesne rates* are in England usually called *mesne profits*; and in *Adams on Ejectment*, I find the following statement at page 380, "It has been said that a lessor in ejectment may, if he please, waive the trespass and recover the *mesne profits* in an action for use and occupation; but this election must be limited to the profits accruing *antecedently* to the time of the demise in the ejectment." In *Pulteney v. Warren* (a), Lord Eldon seems to take that distinction. Therefore, it is at least doubtful, that even upon the strictest principles of construction I should be bound to read the words *mesne rates* as meaning exclusively the profits accruing from the day of the demise in the ejectment; and if I should so interpret them in the present case, I think I should be giving them a meaning which the parties to the recognizance did not intend them to bear. As to the understanding of one of the parties respecting his liability—and that party one of the sureties,—there can be no doubt, for we have his own sworn statement upon the subject. He was examined in the cause as one of the plaintiff's witnesses, and in answer to a cross-interrogatory, his deposition is—"if the plaintiff fails in this suit I shall be liable to pay the defendants Mary, Jane, and Anne Purcell, the sum of about £823, under and by virtue of the recognizance in my answer to a former interrogatory,"—being the recognizance in question. In truth, there could not, under the circumstances, be any doubt as to the meaning or intention of any of the parties; nor, that each understood himself to be liable in case the plaintiffs's suit should fail, to pay the sum of £827, on account of rent stated to be due up to and for the 1st of May 1840, from the plaintiffs to the defendants; and, therefore, even if the words used in the condition could not, according to their strict meaning, be construed (as I think they may) as referring

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(a) 6 Ves. 92.

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Feb. 13.

JOHN SMITH, *Plaintiff.*
 JONATHAN HARDING and WILLIAM SMITH, *Defendants.*

Where it appears upon the deposition of a witness that he is incompetent by interest, the Court will not, except in a very clear case, permit him to be re-examined for the purpose of shewing that the allegation by which his interest appeared was by mistake.

THIS was a motion on behalf of the defendants for liberty to examine Samuel Smith as a witness, in aid of the inquiry directed upon the hearing of the cause, notwithstanding the examination already had of the said Samuel Smith in chief in the cause: saving all just exceptions.

The suit was instituted by the plaintiff John Smith to restrain the defendant William Smith and his assignee, the defendant Jonathan Harding, from issuing execution upon a judgment obtained against the plaintiff by one George Roe in the year 1817, and which was afterwards assigned by the said Roe to the defendant William Smith, who was son of the witness.

The plaintiff and Samuel Smith, the witness, were brothers; the latter was the executor of his father, under whose will the plaintiff was entitled to certain pecuniary legacies and to certain cattle and other stock. The case made by the plaintiff in this cause was, that, in the year 1810, he applied to his brother Samuel for payment of the legacies, &c., and that Samuel, being then indebted to George Roe in the sum of £500, borrowed from the said Roe the further sum of £500, and paid it over to plaintiff in discharge of said claims; and in order to secure the repayment to Roe of the entire sum of £1000, the plaintiff and Samuel executed to him their joint and several bond dated the 26th April 1810, conditioned for the payment of the said sum of £1000, and interest, with warrant of attorney for confessing judgment: that upon this bond the judgment in question had been entered up against the plaintiff, who paid the first year's interest upon the joint debt, but did not make any further payment on account of it.

The defendants examined Samuel Smith, whose testimony, if admissible, would have completely disproved the plaintiff's case. One of the interrogatories administered to him was the following:—"View and look upon the exhibit now shewn to you at this the time, (&c.) and marked (&c.) purporting to be a joint and several bond of you and of the plaintiff, to one George Roe: endorse your name thereon, and set forth in your answer to this interrogatory how much money was paid by the said George Roe in consideration of the execution of the said joint and several bond; to whom was the money so advanced by the said George Roe paid; was the same, or was it not, paid by the said George Roe to the plaintiff? If yea; did the plaintiff at any time, and when, give credit to you for the said sum so advanced to him by the said George Roe, or any and what part thereof, on foot of his claim against you on account of the legacies of £500 and £300 in the preceding interrogatory mentioned? Were, or were not, the sums due to the plaintiff on foot of the said legacies paid to him by you, exclusively and independ-

"ently of the said sum of £500, so received by the said plaintiff from the said George Roe? Did you, or did you not, join in the said joint and several bond for the purpose of raising the sum of £500 to pay off the balance then due from you to the plaintiff on foot of his legacies; or was the said sum of £500 in fact applied in payment of the said balance?" In answer to this interrogatory, the following was the deposition of the witness:—"I have viewed (&c.) the paper writing now produced and shewn to me, marked (&c.), and purporting to be the joint bond of the plaintiff and me to said George Roe. The consideration for said bond was a sum of £500, which said George Roe then lent to said plaintiff, and a sum of £500 which he had previously lent to me. The plaintiff did not pay any part of said bond to said George Roe. *I had been obliged to pay the full amount thereof; and plaintiff gave me no credit for same in the amount of the legacies under his father's will, and he is still indebted to me in the said sum of £500, and interest thereon, over and above said legacies and all allowances; as I merely joined the plaintiff to enable him to borrow said sum of £500,—as Mr. Roe had refused to lend the money to him unless I joined him. The sums due to the plaintiff by me, as his father's executor, were paid to him by me, exclusive and independent of said sum of £500 which plaintiff had borrowed from said George Roe.*"

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The cause was heard on the 4th of February 1841, when the evidence of the said Samuel Smith was rejected on account of the foregoing deposition; and by the decree it was referred to the Master to inquire whether the plaintiff had to any and what extent joined as a surety in the bond bearing date the 26th day of April 1810. The purpose of the present motion was to render Samuel Smith's evidence available, by re-examining him and shewing that he had no interest in the matter.

In support of the motion was read the affidavit of the witness, which stated, that he was advanced in life, and his eye-sight defective; that the statement in the deposition as to the said sum of £500 and interest thereon being due to deponent, must have been introduced by the mistake either of the witness or of the examiner; inasmuch as the said sum of £500 and interest had been at the time of the examination and still was due not to deponent, but to the defendant William Smith or his assignee.

The defendant William Smith also made an affidavit confirming that of the witness, his father.

Mr. Collins, Q. C., and Mr. Burroughs for the motion.—The passage in the deposition from which the interest of the witness has been inferred, is not an answer to any inquiry contained in the interrogatory; and the witness distinctly swears that it was introduced by mistake, and that at the time of the examination, or now, he neither was nor is interested in the matter. But even supposing him to have been interested and incompetent, in the first instance, he may have been rendered competent

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by a release of his interest, and re-examined. His present affidavit is a very effectual disclaimer of his supposed interest; and the Court will not permit a clear mistake to deprive a party of the benefit of his witness. Although, as a general rule, a witness cannot be re-examined to the same fact for the purpose of enabling him to correct a former statement, there may be an exception in particular cases: *Rowley v. Adams* (a); and this Court has always regarded the case of accident or mistake as an exception to general rules: *Milward v. Atkins* (b); *Griells v. Gansell* (c); *Kirk v. Kirk* (d). Another ground of exception to the general rule appears to be, where a witness who is rejected as being interested, without any improper motive, releases that interest: *Callow v. Mince* (e), which was not cited in *Vaughan v. Worrall* (f). Suppose an issue was directed to a jury, should not the witness be competent if uninterested when produced, though interested on his first examination? Why should the principle of the rule of evidence be changed because the mode of inquiry is different? Is the Master of the Court less trustworthy than a jury? If an interested witness may be reproduced before a jury after he has released, it would seem *à fortiori*, that he may be reproduced before the Master, who is, perhaps, less likely to be imposed upon.

In *Smith v. Althus* (g) it was decided, that where the Court directs an inquiry, it is in the nature of a new issue joined, and what should be evidence in any other case should be evidence before the Master.—Here such an inquiry has been directed.

Mr. Smith, Q. C., and Mr. William Smith for the plaintiff.—This application should be refused. The Court will be very cautious how it gives a witness the opportunity of mending his evidence after finding where the defect lies: *Abergavenny v. Powell* (h); *Knos v. Knos* (i). In *Byrne v. Frere* (k), either the learned Reporter must have misapprehended the order of the Court, or there is a misprint in the report; as upon reference to the Registrar's book, it appears that the motion was refused.*

THE MASTER OF THE ROLLS, after reading over the interrogatory and deposition, appeared inclined to think that the passage in question was introduced into the deposition by mistake, and that he should order it to be expunged. But on conferring in Chamber with Mr. Fenton, the Examiner, his Honor was pleased to refuse the motion without costs.

(a) 1 My. & K. 543.

(b) Jac. 339, note m.

(c) 2 P. Wms. 645.

(d) 13 Ves. 280; and see the preceding case, and *Jefferyes v. Goodwin*, *ante*, p. 99. and the cases there cited.

(e) Pr. Ch. 234; and 1 Eq. Ca. Ab. 223.

(f) 2 Swst. 402.

(g) 11 Ves. 564.

(h) 1 Mer. 130.

(i) 1 Ir. Eq. Rep. 107.

(k) 2 Mol. 396.

* A copy of the order was furnished to the Court.

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FITZGERALD v. LANE.

Feb. 9.

MR. F. GOOLD moved, on behalf of the plaintiff, for payment of the purchase-money of the lands of Rathjordan, pursuant to an allocating report.

The following judgments, which were duly redocketted, and prior to certain legacies decreed to be paid to parties in the cause, appeared on record:—

1st,—	A judgment of Trinity Term	in the year	1780.
2nd,	„	Trinity Term	„ 1786.
3rd,	„	Hilary Term	„ 1791.
4th,	„	Hilary Term	„ 1796.
5th,	„	Trinity Term	„ 1801.
6th,	„	Easter Term	„ 1795.

It also appeared that the first two of those judgments were vested as a collateral security in a mortgagee, who was a party in the cause, and he was willing to satisfy them upon being paid the sum applicable to his demand pursuant to the allocating report. The third judgment was vested in a trustee the plaintiff, and he also was willing to satisfy it upon being paid the amount allocated to him by the report. The fourth and fifth were obtained by one Quin, who went into the Master's office and filed a charge for those judgments under the decree to account; to which the plaintiff put in a discharge relying on the statute of limitations; and as nothing further was done by Quin, the Master's report did not find any thing to be due to him. He died in some time afterwards, and the judgments were now vested in his personal representatives. The sixth was vested in one Bunbury, who had not filed any charge under the decree to account, but since the final decree for a sale had been pronounced, an order was made upon consent that he should be at liberty to file a charge on account of his judgment; and having done so, and the statute of limitations having been set up as a bar, the Master reported that nothing was due upon it. The report had not as yet been confirmed; however, it had not been objected to.

Mr. *Jenkins* for the purchaser, submitted that the purchase-money ought not to be paid out until either the several above-mentioned judgments were satisfied upon record, or the purchased lands released from them. In *Barrett v. Birringtonham* (a), the judgments were puisne to the

Where lands are sold under a decree, the purchaser is entitled to have all judgments paid out of the purchase-money, satisfied upon record.

But where a judgment creditor went in and filed a charge under the decree, to which the plaintiff filed a discharge, relying on the statute of limitations, and nothing further having been done upon the charge, the Master's report did not find any thing due on foot of the judgment; *Held*, that notwithstanding the death of the judgment creditor, the purchaser under the decree was not entitled to have such judgment satisfied nor the lands released from it by deed; as the filing of the charge made the creditor a *quasi* party, and bound him and his representatives by the decree.

And when a judgment creditor comes in under a consent order after

the final decree, and the Master finds against the judgment as being barred by the statute of limitations, the Master's report must be made up and confirmed, otherwise the purchaser under the decree will be entitled to have the judgment satisfied, or a release executed.

(a) 1 Ir. Eq. R. 421.

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rights decreed; yet it was necessary to bring the judgment creditors before the Court by supplemental bill, in order to have the creditors bound by the decree. In *Ponsonby v. Ponsonby* (a), the late Master of the Rolls decided that a purchaser is entitled to have all encumbrances prior to the rights decreed satisfied upon record.

The MASTER OF THE ROLLS said he would read the report, and the charges filed by Quin and Bunbury, and the discharges thereto.

Feb. 12.

MASTER OF THE ROLLS.

I have read the papers in this case, and have made the order for allocation of the purchase-money. The first three judgments mentioned on this motion, and which are to be paid off under the present order, must be first satisfied upon record. I cannot allow the purchaser's objection as to the fourth and fifth judgments now vested in the representatives of William Quin, and in respect of which Quin filed a charge under the decree to account in this cause; as by so doing he bound himself and his representatives by the decree confirming the Master's report, which did not find any thing to be due upon those judgments. If his representatives should hereafter proceed against the lands, the purchaser would be amply secured by the proceedings in this cause, which should entitle him to whatever costs he might be put to by his defence. As to Bunbury's judgment, the Master's report, finding that nothing is due upon it, has been made up and is now confirmed: I could not otherwise have made the order for payment of the purchase-money; as Bunbury did not go into the Master's office until after the final decree, and the purchaser should have been entitled to have either the Master's report under the order of reference confirmed, or satisfaction entered upon the judgment, or the lands released from it. But it appears that the plaintiff is ready to furnish to the purchaser attested copies of the charge and discharge, and of the Master's report.

(a) 2 Hog. 204.

FLOOD v. SUTTON.

Feb. 5.

Under the 1 W. 4, c. 47, s. 11, an infant defendant entitled to the equity of redemption of lands decreed to be sold in a foreclosure suit, ordered to execute the conveyance to a purchaser under the decree, although the decree gave to the infant a day to shew cause against it, upon his coming of age.
Whether the decree should have given the infant a day to shew cause—*quære*.

sold under the decree in this cause, in the name of the infant defendant William Sutton.

The bill was filed to foreclose a mortgage and for a sale, against Thomas Sutton, as heir and personal representative of Patrick Sutton the mortgagor. On the 7th of May 1832, the plaintiff obtained a decree directing accounts of the several sums due for principal, interest and costs, on foot of the several mortgages in the bill mentioned, and of other encumbrances on the mortgaged premises; and the defendant Thomas Sutton having died before the final decree, the suit was revived against his eldest son and heir, the minor William Sutton. On the 27th of June 1837, there was the usual final decree for payment to the plaintiff and other encumbrancers of the sums reported, and in default, for a foreclosure and sale of the mortgaged premises; under which the lands were afterwards sold in lots to several purchasers. The decree, as originally framed, did not give to the minor William Sutton a day to shew cause against it upon his coming of age; but the purchaser having objected to the title upon that ground, the decree was lately amended by giving the minor a day to shew cause. It contained the usual direction that, in case of a sale, all proper and necessary parties should join in conveying to the purchaser or purchasers; and the minor, being a necessary party to the conveyances, was served at the house of his mother with a copy of the decree, and, at the same time, the conveyances, as approved and executed by the Master and the several other parties in the cause, were tendered to him for execution, but he refused to execute them.

Mr. De Moleyns for the motion.—The present application is in pursuance of the 11th section of the 1 *W.* 4, c. 47. This is a foreclosure cause, and the minor is heir of the mortgagor and entitled to the lands subject to his debts. The decree, under which the sale was had, is for a foreclosure of the mortgage, and for a sale of the lands for payment of the several sums reported, being the debts of the mortgagor.—[MASTER OF THE ROLLS. Does the decree give the infant a day to shew cause?]
—Yes; but, as originally framed—under the authority of *Powys v. Mansfield* (a)—it did not: however, after the sale was had, and while the title was under investigation, Lord Cottenham's decision in *Price v. Carver* (b) appeared, and the purchaser then objected that the decree was defective in not giving the infant a day to shew cause; in consequence of which it was amended in that particular under an order of the Lord Chancellor.—[MASTER OF THE ROLLS. Should not the 10th and 11th sections (c)

(a) 6 Sim. 637.

(b) 3 Myl. & Cr. 157.

(c) The following are the 10th and 11th sections of 1 *W.* 4, c. 47:
Section 10.—“And be it further enacted, that from and after the passing of this act, “where any action, suit or other proceeding for the payment of debts or any other purpose,

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of the 1 *W. 4*, be construed together?—It would seem from the decision in *Price v. Carver* that the parol demurring is quite distinct in principle from the giving a day to shew cause. Lord Cottenham in delivering his judgment said, he “always conceived that the parol “demurred in Equity in those cases only in which it would have demurred “at Law.” And again:—“When the parol demurs in Equity, nothing “is done to affect the infant; but when a day is given the decree is “complete; but the infant has a day given to shew cause against it, and “if he do not shew good cause within the time specified, he is bound.”— “All cases of foreclosure and partition, and and all others in which a “conveyance is required from an heir, except those in which the parol “would demur at Law, are cases in which a day is given, but the parol does “not demur. Of all such cases, the statute takes no notice, and affords “no remedy for them, except that by the 11th section it enables the “Court to take from the infant the legal estate of property decreed to be “sold for payment of debts, but for that purpose only.”

In the present case, the decree is for a sale for payment of debts; and the day given to the minor to shew cause can make no difference, as there can be no doubt that upon attaining his age he would be entitled to have the decree reversed if he could shew error in it, although no day were given to him for that purpose. The 11th section of the act is express as to the conveyance in the meantime.

Feb. 13.

MASTER OF THE ROLLS.

This was a motion by the plaintiff for an order under the 11th section of 1 *W. 4*, c. 47, that the Master do execute, in the name of an infant

“shall be commenced or prosecuted by or against any infant under the age of twenty- “one years, either alone or together with any other person or persons, the parol shall “not demur, but such action, suit or other proceeding shall be prosecuted and carried “on in the same manner and as effectually as any action or suit could before the passing “of this act be carried on or prosecuted by or against any infant, where, according to “law, the parol did not demur.”

Section 11th.—“And be it further enacted, that where any suit hath been or shall “be instituted in any Court of Equity, for the payment of any debts of any person or “persons deceased, to which the heir or heirs, devisee or devisees, may be subject or “liable, and such Court of Equity shall decree the estates liable to such debts, or any “of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy “of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, “as the law at present stands, be compelled; in every such case such Court shall “direct, and, if necessary, compel such infant or infants to convey such estates so to “be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, “and in such manner as the said Court shall think proper and direct; and every such “infant shall make such conveyance accordingly; and every such conveyance shall be “as valid and effectual to all intents and purposes as if such person or persons, being “an infant or infants, was or were at the time of executing the same of the full age of “twenty-one years.”

defendant, the conveyances to the several purchasers under the decree;— the conveyances having been tendered for execution to the minor, and he having refused to execute them. The application is informal; as the proper order under the statute is, that the minor do execute.*

It appears that the decree, under which the sales have taken place, is for foreclosure of a mortgage, and for a sale of the lands for payment of the debts of the mortgagor. In its original form, it did not give the minor a day after he shall come of age to shew cause against it; but, being objected to by the purchaser upon that ground, it was altered in that particular, and now gives the day. The question upon this motion is, whether the minor should now be ordered to execute the conveyance to the purchaser, where a day for shewing cause has been given to him by the decree.

In *Price v. Carver* (a), it was decided that in foreclosure suits, an infant defendant entitled to the equity of redemption, should have by the decree a day after he attains the age of twenty-one to shew cause against it. There is, however, a marked distinction between the English practice and the Irish, in mortgage causes: in England, the decree is for a foreclosure simply; but in Ireland, there is, in fact, no such thing as a foreclosure, and the decree is for a sale for payment of debts. Whether, according to the Irish practice in mortgage causes, it is necessary or proper that the decree should give the minor defendant a day to shew cause, it is unnecessary in this case to determine. Here the day is given; and I am of opinion that as this is properly not a case of foreclosure, but of a sale for payment of debts, the Court is bound, notwithstanding the day given, to order the minor to execute the conveyance to the purchaser. The statute, I think, is peremptory.

ORDER :—It appearing to the Court that the said William Sutton was made a defendant in this cause as the heir of Patrick Sutton deceased, whose debts are to be paid out of the produce of the sale of the lands and premises decreed to be sold under the decree in this cause, for which debts the Court has decreed the lands and premises so directed to be sold to be liable, the Court doth order that the said William Sutton do execute the said several conveyances of the lands and premises sold under the decree in this cause, which have been approved of by the Master as proper and necessary deeds to be executed by the said William Sutton, for conveying a good title to the said purchaser, and have been executed by the Master; that is to say, the deed of con-

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(a) 3 My. & Cr. 157.

* In *Jones v. Ham*, a petition was said to be necessary in a case of this kind.

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veyance marked A., &c. And it is further ordered, that the said William Sutton do execute the said several deeds, on the same being tendered for execution at the residence of his mother Alicia Sutton in Werburgh-street, in the city of Dublin, at any time to be appointed for the execution thereof between the hours of ten o'clock in the morning and four o'clock in the afternoon, on any day after the expiration of six days from the service of a notice that a person on behalf of the plaintiff will at a certain time, to be stated in such notice, attend at said house with said deeds, for the purpose of having the same executed by the said William Sutton.

WATSON v. PIM.

April 20.

The plaintiff is entitled as of course to examine a defendant as a witness, waiving all just exceptions. There is now a side-bar rule for the purpose.

Whether a plaintiff examining a defendant as a witness waives all relief as against him, or only that portion of relief to be given in respect of the matters to which the defendant is examined? *Quære.*

THIS was a motion of course, on behalf of the plaintiff, for liberty to examine the defendants Henry Cavendish Johnson and Jane his wife, saving just exceptions.

Upon the motion being opened, the Master of the Rolls expressed a doubt that the plaintiff could have such an order, except upon the terms of waiving all relief against the defendant sought to be examined.

Mr. J. Lyons, for the motion.—The plaintiff does not necessarily waive all relief against a defendant by examining him, but only a right to any decree which may be founded upon the matters to which the defendant is examined. The principle of the rule is, that a man shall not be compelled to give evidence against himself; and therefore, where a defendant is examined as a witness, there cannot be a decree against him founded upon his own testimony. But a plaintiff does not waive a decree against a defendant by examining him respecting matters totally unconnected with the relief sought against him. The observations of Sir A. Harte, in *Ellis v. Deane* (a), and Lord Lyndhurst in *Hutton v. Sandys* (b), shew that the rule must be taken with some qualification. Lord Lyndhurst, in the case referred to, said, "As a general rule, if a party in a cause be examined as a witness, you can have no relief against him *as to the points on which he is examined.*" Orders such as that now sought are quite as of course in England, the objection to the evidence being open at the hearing of the cause: *Lee v. Atkinson* (c).

(a) 3 Mol. pp. 53-58.

(b) 1 Younge, 608.

(c) 2 Cox, 413; see also *Blake v. Blake*, 1 Ir. Eq. R. 198.

MASTER OF THE ROLLS.

In this case, a motion of course is made on behalf of the plaintiff, for liberty to examine certain of the defendants, saving just exceptions. The English practice in such cases is relied on, and it is contended that the general rule, precluding a plaintiff from obtaining a decree against a defendant who has been examined by him as a witness in the cause, does not extend to the case where the evidence given would not assist the plaintiff in obtaining a decree against such defendant.

Several of the authorities lay down the rule without any such qualification as is contended for, and tend to shew that the plaintiff can read the evidence only upon the terms of waiving all relief against the defendant who has been examined: *Scroggs v. Scroggs* (a); *Hill v. Adams* (b); *Thompson v. Harrison* (c); *Gibson v. Albert* (d); *Massy v. Massy* (e). In *Bernal v. The Marquis of Donegal* (f), Lord Eldon says "There is nothing better established than this, that if you choose to examine a defendant you cannot have any decree against him." In the case cited from *Younge's Reports* (g), which was before Lord Lyndhurst, it is plain that there was no argument upon the point now raised. However, the cases relied upon in support of the motion certainly go to shew that the law upon the subject cannot be considered as settled; and, without at present pronouncing any opinion upon that subject, I think the proper course will be to make the order in the form sought for, as the question respecting the effect of reading the evidence will be open to the parties upon the hearing of the cause.

It is remarkable, that a side-bar rule, enabling a plaintiff to examine defendants in the cause, saving just exceptions (a copy of which has been furnished to me from the Registrar's Office), existed prior to the General Orders of November 1834, although no such rule is to be found in Mr. O'Keeffe's collection. Upon consideration, I can see no reason why the examination of a defendant as a witness, saving just exceptions, should apply only as between co-defendants, and I shall take steps to have a side-bar rule, setting plaintiffs and defendants upon an equal footing in this respect, added to the General Orders, so that such a motion as the present shall be for the future unnecessary (h).

(a) Amb. 816.

(b) 2 Atk. 39.

(c) 1 Cox, 344.—It may be observed as to this case in *Cox*, that the marginal note does not appear to be warranted by the decision; which seems to have been merely that the plaintiff who had released a defendant primarily liable, could have no relief against a defendant liable in a secondary degree. See *Nightingale v. Dodd*, Amb. 583, which seems to be an express decision on the point discussed in this case.

(d) 10 Mod. 19.

(e) Beatt. 353.

(f) 3 Dow. P. C. 150.

(g) *Hutton v. Sandys*, 1 Younge, 608.

(h) Upon inquiry in the office since the above order was pronounced, the Reporter was informed that instructions had been received by the Officer to give the plaintiff a side-bar rule for liberty to examine a defendant saving just exceptions. The case, however, of a third person coming in to prove under the decree, it was said, remains as before, &c. See *Cramer v. Griffith*, 1 Ir. Eq. B. 369.

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JAMESON v. FARRER.

(*Equity Exchequer.*)

Feb. 8.

By marriage articles, the intended husband covenanted with the trustees that a certain sum of money should be vested in the trustees and the survivor of them and the executors and administrators of such survivor for ever, upon the trusts specified in the articles. The marriage was celebrated, and the husband, with the assent of the trustees, obtained possession of the money; *Held*, in a suit for the administration of the assets of the husband, that the trustees were entitled to rank as specialty creditors of the husband, in respect of that sum of money.

THE bill was filed by a simple contract creditor of T. Leland, on behalf of himself and the other creditors, for the administration of his assets. The usual decree to account was pronounced; and the cause now came before the Court upon the Remembrancer's report, exceptions and merits.

The Remembrancer reported that by indented articles of agreement, under the hand and of seal T. Leland, dated the 10th of January 1794, and made and executed upon his marriage with the defendant, Catherine Leland otherwise Franks, the sum of £833. 6s. 8d., late currency, being the share or proportion of a sum of £3000 to which Catherine Franks was then entitled, together with other sums, were vested in J. Leland and Thomas C. Kearney upon certain trusts; and amongst others, to secure a jointure of £100 *per annum* to Catherine Franks, in case she should survive her intended husband. And it was by the said articles covenanted and agreed upon by and between the parties thereto, that the said sum of £833. 6s. 8d. late currency, so due to Catherine Franks as aforesaid, should become vested in J. Leland and T. C. Kearney, and the survivor of them, and the executors and administrators of such survivor for ever, subject to the uses, intents and purposes therein mentioned; and should be and enure to the child or children of the said intended marriage, payable in such shares and proportions, and at such times as therein mentioned.

By marriage settlement, a sum of £5000 was vested in trustees upon trust to permit the wife, in case she should survive her husband, to receive the interest thereof during her life; and in case there should be no issue of the marriage, in trust for the husband absolutely: with power to the trustees, with the consent of the husband and wife, to invest the money in Government or on real security. The money was afterwards, with the consent of the husband and wife, lent upon mortgage. The husband died without issue; and by his will, bequeathed his interest in the £5000 to A. upon certain trusts, and appointed him his executor. The wife afterwards married B.; and upon her marriage, the interest on the £5000 was assigned to A. upon trust to pay the yearly interest on the £5000 to the wife for life; and A. covenanted with the wife that he, his executors, &c., would stand possessed of the premises assigned to him upon the trusts therein mentioned. The £5000 was paid to A. out of the produce of a sale had in a suit in which he was a defendant; and A. represented to B. that he had invested the money upon Government security; and paid her interest according to the rate it would have borne if it had been so invested. The money was not in fact so invested, but was applied by A. to his own use.

Held, in a suit for the administration of A.'s assets, that the new trustee of B.'s last marriage settlement, was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the £5000 calculated at £6 per cent;—and also (there being a deficiency of the assets to pay the £5000, which was a debt by simple contract), as a specialty creditor for any future deficiency in the interest, calculated at £6 per cent.

Costs of the suit given to the plaintiff, a simple contract creditor, in priority to the demands of judgment and specialty creditors; the suit being necessary, and having been properly conducted.

That in 1809, the trustees had in their hands as such trustees the said sum of £833. 6s. 8d.; and that T. Leland applied to them to lend him the said sum upon an assignment of certain mortgages and judgments affecting the estate of W. Vincent, then vested in him; to which the trustees agreed: and accordingly, by indenture of the 1st July 1809, T. Leland assigned the said mortgages and judgments to the trustees, to hold to them to and for the trusts and purposes in said indenture mentioned.

That J. Leland died in December 1829, leaving T. C. Kearney him surviving; and after his death, on the 13th of April 1830, the principal sum of £833. 6s. 8d. was paid off by W. Vincent; and by indenture, dated the 1st of March 1830, under the hands and seals of T. Leland and T. C. Kearney, they the said T. C. Kearney (as the surviving trustee under said articles) and T. Leland, in consideration, amongst other sums, of the said sum of £833. 6s. 8d., the receipt whereof they did thereby respectively acknowledge, assigned the said mortgages and judgments to W. Vincent.

That the said principal sum was paid by W. Vincent to, and was received by T. Leland, and not by T. C. Kearney, and was applied by him to his own use.

The Remembrancer then ascertained the sum due to J. C. Kearney, the personal representative of T. C. Kearney, on foot of the said principal sum; and reported that J. C. Kearney, in respect thereof, was entitled to rank as a specialty creditor in the administration of the assets of T. Leland.

To this report the plaintiff excepted, on the ground that the Remembrancer ought to have reported that J. C. Kearney in respect of said sum, was entitled to rank merely as a simple contract creditor of T. Leland.

The *Solicitor General* for the plaintiff.

Mr. *Smith*, Q. C., for J. C. Kearney.—The trustees are specialty creditors of Leland by reason of his covenant in the articles of 1794,—that this sum of money should be vested in the trustees for ever upon the trusts of those articles. That very sum of money afterwards came into his possession: and not having been by him paid over to the trustees, but applied to his own use, he became liable to the trustees, on his covenant, the debt is a specialty debt. *Benson v. Benson* (a); *Mavor v. Devonport* (b). So, also, it may be argued that Leland and Kearney, having in the assignment of the 1st of March 1830, acknowledged, under hand and seal, the receipt of this sum of money, and the report having found that that identical money was paid to Leland and not to Kearney, it constituted a specialty debt due by Leland to Kearney. *Gifford v. Mauley* (c); *Turner v. Wardle* (d).

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(a) 1 P. Wms. 130-31.

(b) 2 Sim. 227.

(c) Ca. t. Talb. 139.

(d) 7 Sim. 80.

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Mr. *Radcliffe* in reply.—The test is, could an action of covenant be maintained against Leland, upon the facts found by the report? The money was vested in the trustees; they had the possession of it. Twenty years afterwards they, and the tenant for life, concur in committing a breach of trust. That merely creates a simple contract debt.

PENNEFATHER, B.—As a general principle, Equity follows the Law; and therefore in cases like the present, the first inquiry usually is, whether an action of covenant could be maintained by the party? But there are a variety of cases to be found, in which it has been held that persons who have not a right to maintain an action at Law, have a right to come into Equity to enforce the performance of an agreement which is for their benefit. At Law, a person who is not a party to the covenant cannot maintain an action upon it; but in Equity, the persons beneficially interested in an agreement have a right to enforce it. If the agreement be, that money shall remain *for ever* vested in trustees for the use of the wife and children of the covenantor, the persons who are interested in the trusts have a right to enforce them against the covenantor in the name of the defaulting trustee. That is the distinction, in form, between Equity and Law;—in either case, there must be an agreement; but in Equity, the persons beneficially interested in it may enforce it, although they cannot maintain an action at Law upon it. It is a mistake to say that this is to be considered as a case merely between Leland or his representatives and the trustees. It is an agreement between Leland and his wife and children, through the medium of the trustees, that this money should remain for ever vested in the trustees, for their use: and that agreement is made under hand and seal. Is not that agreement violated by Leland's obtaining possession of the money? He thereby prevents its remaining in the hands of the trustees, for the purposes for which it was originally intended; for whether the trustee be in default or not, cannot prejudice the *cestui que trust*. I have no doubt whatever but that Leland was liable upon this covenant. This was money to which he would have been entitled *jure mariti*;—the marriage articles cut down that *jus mariti*, and Leland covenanted that that which would otherwise have belonged to him, should be vested in the trustees, to remain for ever to the use of his wife and children. Then if, at any distance of time, he prevent the execution of that trust by getting the money into his hands, he violates his agreement; and the agreement being under hand and seal, he thereby becomes a specialty debtor.

FOSTER, B., and RICHARDS, B., concurred.

The following state of facts also appeared upon the Remembrancer's report:—

By indenture of the 24th of November 1812, made between Major

R. Boles and Susannah his wife of the one part, and J. Langton, J. Grogan and J. Boles of the other part, R. Boles granted and assigned to J. Langton, J. Grogan and J. Boles, their executors, administrators and assigns (amongst other property), one undivided sixth part of certain lands, together with the sum of £7000 Government £5 per cent stock, in trust to permit and suffer R. Boles to receive and take the rents, issues and profits of the lands, and the interests, dividends and proceeds of the stock during the term of his life; and after his decease, in case his wife, the said Susannah, should survive him, to permit and suffer her and her assigns, to take and receive all and singular the rents, issues and profits of the lands, and the interest, dividends and proceeds of £5000, part and parcel of said sum of £7000, during the term of her life, in lieu of dower and thirds; and in case there should be no issue of the said R. Boles on the body of Susannah his wife, in trust as to the whole undivided sixth part of said lands, to the use of the survivor of them, his or her executors, administrators and assigns; and as to the sum of £7000, to the use of R. Boles, his executors, administrators and assigns. This deed contained a power authorising the trustees, with the consent of R. Boles and Susannah his wife, to invest the stock on real securities.

The trustees, with the consent of R. Boles and Susannah his wife, sold out the £7000 Government £5 per cent. stock; and lent the produce thereof, £7102. 7s. 6d., to the trustees of the settlement of Mr. Ponsonby, upon a mortgage of certain estates, dated the 7th of February 1814.

R. Boles died, without issue, in the month of September 1815; and, by his last will, he devised and bequeathed all the residue of his property, real, freehold and personal (and which included his interest in the £7102. 7s. 6d., expectant on the death of Susannah his wife), to T. Leland, his heirs, executors, administrators and assigns, upon certain trusts; and appointed him his sole executor. Shortly after his death, T. Leland proved his will, and obtained probate thereof.

In 1825, Susannah Boles intermarried with William P. Hoey; and upon that occasion, a settlement dated the 7th of October 1825, was executed between W. P. Hoey of the first part, Susannah Boles of the second part, J. Grogan and J. Boles, surviving trustees in the settlement of November 1812, of the third part, and T. Leland of the fourth part; whereby J. Grogan and J. Boles, by the direction of S. Boles, granted and assigned to T. Leland, his executors, administrators and assigns (amongst other property), the interest and profits arising and to arise from the said sum of £5000 then lately parcel of the said sum of £7000 Government £5 per cent. stock, and amounting to the sum of £5073. 2s. 6d. sterling, parcel of the said sum of £7102. 7s. 6d. secured by the mortgage of the 7th of February 1814: and the same were by the said indenture declared and agreed to be so vested in T. Leland, his heirs, executors, administra-

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tors and assigns in trust, and to and for the uses, intents and purposes thereafter mentioned, and none other; that is to say upon trust, to pay the yearly interest to arise from the said sum of £5000, and from certain other monies of the said S. Boles and then in the hands of T. Leland, to the said S. Boles and her assigns for her life, for her sole and separate use; and after her decease, upon other trusts in the said settlement specified: and T. Leland, in consideration of the premises, did by the said indenture, for himself, his heirs, executors, administrators and assigns, promise, declare and agree to and with S. Boles, her executors, administrators and assigns, that he and they should and would from thenceforth stand and be seized and possessed of all and singular the towns, lands and premises and securities thereinbefore assigned and conveyed to him, to, for and upon the several uses, trusts, intents and purposes thereinbefore mentioned and declared concerning the same; and to and for no other use, trust, intent or purpose whatsoever.

The marriage was afterwards solemnized; and T. Leland acted as such trustee, from the execution of the settlement to the time of his death, when the trusts thereof devolved upon W. P. Hoey as his personal representative: but he having declined to act in the trusts of the settlement, E. Grogan was in 1837, pursuant to an order of the Court of Chancery, appointed trustee in his place; and the trust funds were by deed of the 19th of August 1837, vested in him upon the trusts of the settlement.

After the death of Mr. Ponsonby, a suit was instituted in the Court of Chancery by Thomas Tidd, against F. A. Prittie, T. Leland, the heir and personal representative of Mr. Ponsonby, J. Grogan, and J. Boles; and by a decree pronounced in that cause on the 11th of May 1832, T. Leland was, as the executor of R. Boles, and as such trustee in the settlement of the 7th of October 1825, decreed entitled to the sum then due on foot of the mortgage of the 7th of February 1814; and afterwards by an order made in August 1832, the sum of £6757. 3s., being the amount then due on foot thereof, for principal and interest, was paid to T. Leland as such executor and trustee out of the funds then in bank to the credit of that cause. T. Leland applied that money to his own use; and represented to Susannah Hoey that the sum of £5073. 2s. 6d. late currency, being the proportion thereof on which she was entitled to interest, had been invested by him in the new Government £3. 10s. per cent. stock; and he paid her interest thereon at the rate of £3. 10s. per cent. per annum only, as if the same had been so invested.

The Remembrancer then reported, that there was due to E. Grogan on foot of the difference between the interest on the sum of £5073. 2s. 6d. late currency, at the rate of £3. 10s., and £6 per cent. per annum, (which he charged against the estate of T. Leland,) the sum of £385. 16s. 2½d.; and that E. Grogan was entitled to rank in respect thereof as a specialty creditor of T. Leland. And further, he reported that E. Grogan, as

such trustee as aforesaid, was entitled to have a value put upon the life interest of S. Hoey, in so much of the sum of £5073. 2s. 6d. late currency, as the assets of T. Leland should be insufficient to pay to the personal representative of R. Boles; or else to have a portion of the assets of T. Leland set apart sufficient to secure an annual payment to S. Hoey, equivalent to the yearly interest on such part of the said sum of £5073. 2s. 6d., as the assets of T. Leland should prove insufficient to pay to the personal representative of R. Boles; and that E. Grogan was entitled to rank in respect of the amount of such valuation, or of such sum so to be set apart, as a specialty creditor in the administration of the assets of T. Leland.

To this report the plaintiff excepted: first, on the ground that the Remembrancer ought not to have found E. Grogan, as such trustee, a creditor at all against the estate of T. Leland in respect of the difference of interest between £3. 10s. and £6 per cent. per annum on the said sum of £5073. 2s. 6d.—second, that he ought to have found that E. Grogan, in respect of said difference, was entitled merely as a simple contract creditor of T. Leland:—third, that he ought not to have found E. Grogan a creditor at all, in respect of the life interest of S. Hoey, in so much of the said sum of £5073. 2s. 6d. as the assets of T. Leland should prove insufficient to pay.

The *Solicitor General* and Mr. *Radcliffe* for the plaintiffs, admitted that Leland was chargeable with the difference between interest at the rate of £6 per cent. and £3. 10s. per cent. on the sum of £5073. 2s. 6d. ;* but argued that he was only a simple contract debtor for that difference: for that the default of the trustee in not investing the trust funds in the three and a-half per cents was a breach of his general duty as trustee, and not a breach of any covenant in the settlement of Mrs. Hoey.

Mr. *Brewster*, Q. C., and Mr. *Pilkington*, for the trustee in the settlement of October 1825.—It is admitted that Leland became a debtor by specialty for the principal money, which, instead of investing in the public funds, he applied to his own use: and no reason can be assigned why the interest thereon should not be a debt of the same nature. Leland has also covenanted for the payment of this interest, for he covenants that he would stand possessed of the town, lands and premises and securities assigned to him upon the trusts mentioned in the settlement; which trusts were, amongst others, to pay the interest to arise

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* On this question, see *Forrest v. Elwes*, 4 Ves. 492; *Pietz v. Stace*, 4 Ves. 620; *Pocock v. Reddington*, 5 Ves. 794; *Ex parte Shakeshaft*, 3 B. C. C. 197; *Byrchill v. Bradford*, 6 Mad. 236; *Devaynes v. Noble*, *Clayton's Case*, 1 Mer. 572; *Eate v. Scales*, 12 Ves. 402.

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from the sum of £5000 (that is to say at the rate of £6 per cent, according to the admission of the plaintiff), to S. Boles for her life. He covenants to perform his duty as trustee; therefore every breach of his duty constitutes a specialty debt.

PENNEFATHER, B.

The Court was at first struck with the objection, that this was a breach of the general duty of the trustee, and not of any contract under his hand and seal; and, therefore, that it merely created a simple contract debt. But upon looking into the settlement, we find that there is a contract under the hand and seal of the trustee, which, in our opinion, makes Leland a specialty debtor in respect of this breach of trust. He is bound by an instrument under his hand and seal, to hold and apply the principal money in the manner specified in the settlement; and there is no question but that Leland is a debtor by specialty for the amount of the principal sum. He is also bound, by the same instrument, to pay the interest to the *cestui que trust*; and his contract to pay the interest is secured in the same manner as his contract to pay the principal. What, then, is the interest which the trustee contracted to pay? If the money had remained in the hands of the trustee, he must have paid legal interest for it at the rate of £6 per cent.: and shall he be in a better situation because he has endeavoured to impose upon his *cestui que trust*, by informing her that he had invested the money in the public funds, and paying her interest as if it had been so invested? If he had so invested the trust money, the *cestui que trust* would have had the benefit of any rise in the funds, and of Government security; and perhaps she might have exercised a sound discretion in adopting the act of the trustee: but he did not so invest the money; and justice requires that he should not take advantage of his own misrepresentation; and that he should be placed in the same situation as if he had never invested the money in the funds; or having invested it, that he had afterwards sold it out, without the consent of his *cestui que trust*; in which case he would be answerable for legal interest. He has bound himself by covenant to pay the principal and the interest which might accrue due on it, in the manner specified in the settlement: and the circumstances of the case establish that the interest he is liable to pay is at the rate of £6 per cent.

FOSTER, B.

It is not disputed that Leland was a specialty debtor for the principal; the question is whether, upon the same state of facts, he is only to be considered as a debtor by simple contract for the interest? The deed, however, shews that he is a debtor by specialty for both principal and interest.

RICHARDS, B.

Generally speaking, a Court of Equity considers that which a party contracts to do, as done; and charges the contracting party accordingly: but there is a difference with respect to cases between trustee and *cestui que trust*. As between them, it has not been held to be sufficient—in order to execute a contract which the trustee had engaged to fulfil, and by means of which he obtained dominion over the trust funds—to deal with him as if he had performed his contract, he not having actually done so. Again, it is a principle of a Court of Equity, that a trustee shall not be permitted to make a profit of the trust fund; and although the *cestui que trust* might have been content to enter into a contract whereby less than the legal interest was reserved; yet, if the trustee obtain the possession of the trust fund by means of a mis-statement, he shall not be allowed to hold it without paying the full legal interest. That principle has been established by the case of *Benson v. Benson* (a), and has been frequently acted on since. I am, therefore, clearly of opinion, that the Officer was right in charging the trustee with interest at the rate of £6 per cent. Then the next question is, whether this is a specialty debt of the trustee or not? I would be disposed to say, that if the principal be a specialty debt, whatever may be due for interest thereon must also be a debt by specialty, as accessorial and of the same nature as the principal: but it is not necessary to decide that abstract question in the present case; for there is, in this settlement, an express covenant by the trustee to pay all interest which shall arise on the principal sum, to the *cestui que trust*. The principal sum afterwards came to the hands of the trustee; and the interest which arises on that sum, according to the decision of the Court, is at the rate of £6 per cent. I agree with the other members of the Court, that those exceptions must be overruled.

Counsel for the plaintiff then proceeded to argue the last exception.

Mrs. Hoey is entitled to the interest on the £5000 for her life: the principal sum got into the hands of Leland; and the Remembrancer has found that as to that sum he was a debtor by simple contract.—[PENNEFATHER, B. The former exception was argued as if the £5000 was a specialty debt of Leland; and the Court, in pronouncing judgment upon it, assumed that such was the fact; and that it had been assigned to Leland upon the trusts of the settlement. It now appears that it constituted merely a simple contract debt: the reasons, therefore, which the Court gave for its judgment are not, all of them, applicable to the actual state of the facts. The exception, however, must be ruled in the same

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way: for it appears that Leland was a specialty debtor for the entire of the interest, whatever it might be; and the Court having decided that such interest ought to be calculated at the rate of £6 per cent., Leland became a specialty debtor for the amount of it. **FOSTER, B.**, and **RICHARDS B.**, concur.]—Then as to the last exception, how can Leland or his assets be a debtor for interest which he never received? Leland, as trustee in Mrs. Hoey's settlement, had nothing to do with the principal sum of £5000; he was only to receive the interest thereon; and when he received it, he became a specialty debtor for its amount.

Mr. Brewster, Q. C., and **Mr. Pilkington**, for the trustee of Mrs. Hoey's settlement.—It is now ruled that Leland was a specialty debtor for the interest on the £5000: it is said that he is a debtor only for such interest as he should receive; and that he has not received any: but it appears that Leland received the principal money; therefore, he is to be considered as having received the interest as it fell due.

PENNEFATHER, B.—The interest on the £5000 was assigned to Leland upon a special trust, which he covenanted to perform: and having covenanted to pay the interest to Mrs. Hoey, he receives the principal money. Is he not then bound to pay the interest, by virtue of his covenant? He has put himself into a situation in which he is answerable for the interest.

FOSTER, B.—Leland has covenanted to pay the interest on the £5000. The objection made is that there is no fund from which the interest is to arise: the answer is that Leland has received it: and the inference which the plaintiffs seek to draw from these facts is, that Leland was not liable for any interest!

RICHARDS, B. concurred.

Exceptions overruled.

PENNEFATHER, B.

This being a case in which it was necessary that a suit should have been instituted by some person for the administration of the assets of the intestate, and it having been properly conducted, we are of opinion that the plaintiff is entitled to the costs of the cause, to be paid out of the fund in preference to the demand of any specialty or judgment creditor. We say nothing as to his being entitled to those costs as against any mortgagee, if any such there be.

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In the Matter of
THE COMMISSIONERS FOR THE IMPROVEMENT OF
THE NAVIGATION OF THE RIVER SHANNON.

(*In the Rolls.*)

April 28.

THIS was a petition under the Shannon Navigation Act, 2 & 3 Vic., c. 61, presented by Viscountess Castlemaine, and by Lord Castlemaine on his own behalf and on behalf of his children, who were minors,* and

Where lands are purchased by Commissioners under the 2 & 3 Vic. c. 61, for the

purposes of the act, and the purchase-money is lodged in Court, the Court will, under the words "reasonable costs, charges and expenses," in the 29th section, award to the parties entitled, the costs necessarily incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject.

* By the 2 & 3 Vic. c. 61, s. 19, corporations and incapacitated persons may contract with the Commissioners; and by section 25, it is enacted, that where the purchase-money or any part thereof "shall belong to any corporation, *feme covert*, infant, "lunatic, or person or persons under any disability or incapacity," it shall, "in case "the same exceed two hundred pounds," "be paid into the Bank of Ireland in the "name and with the privity of the Accountant-General of the Court of Chancery in "Ireland"—"to the intent that such money or such portion thereof shall be applied, "under the direction and with the approbation of the *Senior Master* of Chancery, to be "signified by an order made upon a petition to be preferred in a summary way by the "person or persons who would have been entitled to the rents or profits of the said "lands, tenements or hereditaments standing settled therewith to the same or the like "uses or purposes," &c.

The 28th and 29th sections are as follow:—

Section 28.—"And be it enacted, that in case any person or persons claiming to be "entitled to or interested in any lands tenements or hereditaments, or other matters "or things, for which any sum of money has been or shall be awarded or contracted "for, or in or to any charge lien or encumbrance thereon, shall refuse to appear "before the said Commissioners, or shall not be able to make out a good title thereto, "or to prove such claim as he shall make, to the satisfaction of the said Commissioners, "or shall refuse to execute such conveyance or conveyances as hereinafter mentioned, "or be under any incapacity, or in case the person or persons so entitled or interested "be absent from Ireland, or cannot be discovered, or in any other case in which it "shall seem expedient to the said Commissioners so to do, it shall and may be lawful "for the said Commissioners in every such case to order the said sum or sums so "awarded or contracted for, or any part thereof, to be paid into or lodged in the Bank "of Ireland in the name and with the privity of the Accountant-General of the Court "of Chancery in Ireland, to be placed to his account there *ex parte* the said Commis- "sioners, to the intent that the same might be subject to the order, control, and dispo- "sition of the said Court; which said Court, on the application of any person or persons "making such claim to such sum or sums of money, or any part thereof, or on the ap- "plication of the said Commissioners if they shall be entitled to receive the same or any "part thereof, by motion on petition, shall be and is hereby empowered, in a summary "way of proceeding or otherwise, as to the said Court shall seem meet, to order the

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by John M'Clintock, a trustee, for the application and investment of a sum of £1222. 8s. 8d., the purchase-money of certain mill concerns and premises adjoining the river Shannon at Athlone, taken by the Commissioners for the purposes of the act, who had lodged the money in the Bank of Ireland pursuant to the 28th section.

The petition stated the will of the late Viscount Castlemaine, under which Viscountess Castlemaine was entitled to the real estates of the testator, including the premises taken by the Commissioners, for the term of her life; remainder to the testator's nephew, the present Lord Castlemaine, for the term of his life, with successive remainders to his children; and the will contained a devise to trustees of the residue of the testator's personal estate, upon trust, to purchase lands to the same uses as the testator's real estates.

The prayer of the petition was, that the said sum of £1222. 8s. 8d. might be invested in the purchase of lands, tenements or hereditaments under the direction and approbation of William Henn, Esq., the senior Master of this Court; and that it might be referred to the said Master to approve of a proper purchase of lands in which the said sum might be invested, and to approve of proper deeds to be executed by all proper parties for conveying and settling the lands so to be purchased, to for and upon such other like uses, trusts, intents and purposes, and in the same manner as and upon which the said several premises aforesaid taken by the said Commissioners stood settled and limited, or such of them as were now existing or capable of taking effect; and that in the mean time, until such purchase should be made, that the said sum of £1222. 8s. 8d. might be invested by the said Accountant-General, with the privity of said Master, in the purchase of new three and a-half per cent. Government stock; and until the said Government stock shall be ordered to be sold by the said Master for the purposes of the purchase aforesaid, that the dividends and annual produce thereof might be paid to the petitioner Florinda

"same to be laid out or invested as to the said Court shall seem meet, or to order payment or distribution thereof, or payment of the dividends or interest thereof, according to the respective estate or estates, title or interest of the person or persons making claim thereto, and to make such order in the premises as to the said Court shall seem meet, just and reasonable; and the cashier or cashiers of the Bank of Ireland who shall receive such sum or sums of money is and are hereby required to give a receipt or receipts for the same, mentioning and specifying from whom and on whose account the same were respectively received, to the person or persons from whom the same were received."

Section 29.—"And be it enacted, that when any money shall be paid into the Bank of Ireland, and be subject to the orders and directions of the Court of Chancery as aforesaid, it shall be lawful for the said Court to order such sum to be paid by the said Commissioners to the persons interested in such money, for their reasonable costs, charges and expenses, as to the said Court shall seem just and proper."

Viscountess Castlemaine for her life, with remainder to the petitioner Richard Baron Castlemaine for his life, or their respective attorneys thereto lawfully authorised, or to such of the petitioners as to the Court should seem meet; and that accordingly, the Accountant-General of this Court might be ordered to draw on the Governor and Company of the Bank of Ireland for the said dividends in favour of the petitioners as aforesaid, to be applied upon the several trusts, intents and purposes mentioned and declared in the will of the said William Lord Viscount Castlemaine of and concerning the same; and that the said Commissioners might pay to your petitioners their costs charges and expenses in relation to the matters aforesaid: and that it might be referred to said Master to tax and ascertain the same, or for such other order, &c.

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Mr. *W. Brooke*, Q. C., and Mr. *Batty*, for the petitioners, relied on the 29th section of the act as entitling them to all costs.

The *Solicitor-General* and Mr. *Jeffcott*, *contra*.

THE MASTER OF THE ROLLS said that he had decided in two or three cases of this kind, that where the Commissioners lodge purchase-money in Court, the Court has jurisdiction, under the latter words of the 29th section of the act, to order the Commissioners to pay to the parties entitled, the costs of having it invested in stock, and also of the investment when necessary, in lands subject to the like trusts as the lands purchased by the Commissioners were liable to.

ORDER:—That the several sums in cash, following, viz., [the purchase-moneys of the several portions of the premises, making altogether £1222. 8s. 8d., severally standing to the credit, and entitled in the Accountant-General's books, *Ex parte* the Commissioners for the Improvement of the Navigation of the River Shannon, &c.] be laid out and invested, with the approbation of William Henn, Esq., the senior Master of this Court, and the privity of the Accountant-General, to an account to be entitled, *Ex parte* the Commissioners for the Improvement of the Navigation of the River Shannon, and of the several petitioners in this matter; and when the same shall be so transferred, it is further ordered that the said Accountant-General do draw upon the Governor and Company of the Bank of Ireland in favour of the petitioner the Right Honorable Florinda Viscountess Castlemaine, or her attorney thereto lawfully authorised, for the interest and dividends from time to time to accrue due on the said stock during her life, or until further order; and after the death of the said Florinda Viscountess Castlemaine,

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it is further ordered that the said Accountant-General do draw on the said Governor and Company of the Bank of Ireland in favour of the petitioner the Right Honorable Richard Baron Castlemaine, or his attorney, &c., for the interest and dividends from time to time to accrue due on the said stock during his life, or until further order: and it is further ordered that it be, and it is hereby referred to the said Master to approve of a proper purchase of lands of inheritance, in which the said sum of £1222. 8s. 8d. should be laid out and invested, pursuant to the trusts of said will of the late William Viscount Castlemaine; and when a proper purchase of lands of inheritance shall be had, it is further ordered that the said Master do then approve of proper deeds of conveyance, with proper covenants, in order to vest the lands to be purchased in proper trustees to be liable to the trusts of the will of the said late William Viscount Castlemaine in relation to the lands and premises in the petition mentioned, and from the sale of which the said sum of £1222. 8s. 8d. has been produced: and the Court doth declare that the said Commissioners are to pay to the Petitioners the costs of this order and the investments thereunder, and any costs that may be properly incurred by the Petitioners in relation to the purchase of lands of inheritance to be made pursuant to this order; and it is further ordered that it be referred to the said Master to tax and ascertain the same.

1841.

Rolls.

GLEESON and others v. EARL of SANDWICH and others.

April 30.

THIS was an application that John Gleeson, a witness who had been examined in this cause on behalf of the plaintiffs, might be re-sworn to his depositions, under the following circumstances:—

The plaintiffs claiming as devisees under the will of their father filed a bill against the Earl of Sandwich and others, for specific performance of an agreement to grant a lease of certain lands in the county of Limerick, made and entered into by and between the testator and the late Earl, under whom the present derived. John Gleeson, the witness, and brother of the plaintiffs, was made a defendant as heir-at-law of his father, and also as claiming some interest in the lands in question under the will. By his answer, he disclaimed all interest, either as heir-at-law or under the will. His father, during his life, gave him a rent-charge on the lands; but previous to his examination, he executed a release of the rent-charge. However, a few days before the execution of the release, two of the brothers of the witness and the plaintiffs in the cause died intestate, whereby John Gleeson, as their heir-at-law, acquired a new interest, which was not included in the release; but since his examination he had executed a release of this new interest, and publication had not as yet passed.

A witness incompetent by interest at the time of his examination, after a release, ordered to be re-examined before publication, it appearing to the Court that there was no intention of varying the evidence already given.

An application merely that a witness may be re-sworn to his depositions, may properly be before publication; but where it is sought that the witness shall be re-examined for the purpose of contradicting or varying his own previous evidence, the application must be after publication, as in such case the Court must have the opportunity of looking into the depositions.

Mr. *O'Shaughnessy*, for the motion, stated that the omission in the former release of John Gleeson's interest, as heir-at-law of his deceased brothers, was accidental; and that the object of the present motion was not for the purpose of enabling the witness to withdraw or contradict any portion of the evidence already given by him, but in order to render that evidence admissible, by simply re-swearing him to his depositions after his release of an interest of which he was not aware at the time of his examination. *Callow v. Mince* (a); *Sandford v. Paul* (b); *Cox v. Atlingham* (c); *Milward v. Atkins* (d).

Mr. *Keller* opposed the motion; and submitted that in Equity it would lead to great mischief if a party were allowed to be re-examined after a release, as the mode of examination gives no opportunity of sifting the evidence as at Law, and it is almost impossible that the witness should be released from the influence which previously prevailed in his mind. In the present case, such influence must be taken to exist very

(a) Prec. Ch. 234.

(b) 1 Ves. jun. 399.

(c) Jacob, 337.

(d) Jacob, 337, n.

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strongly, the witness being in fact a plaintiff until the execution of the second release. In *Vaughan v. Worrall* (a), Lord Eldon pronounced a very strong opinion in accordance with this view; and in the very recent case of *Smith v. Harding* (b), in this Court, an application similar to the present was refused.

MASTER OF THE ROLLS.

Smith v. Harding was a different case. There, the witness had in one of his depositions stated himself to be the person mainly interested in the subject-matter of the suit, and it was sought to re-examine him that he might directly contradict his previous statement. At first, I was inclined to think the case of accident and mistake had been made out by the affidavits, and that I should grant the motion; but afterwards, upon speaking in Chamber with Mr. Fenton, the Examiner, it appeared that it was not a clear case of mistake; and therefore I refused the application. In the present case the application is, simply, that the witness shall be re-sworn to his depositions; and I think the motion is fully sustained by the authorities which have been cited. Where it is sought merely that a witness shall be re-sworn to depositions already taken, the application is properly made before publication passes; but where a re-examination is required to enable the witness to contradict or vary his own previous evidence, the application should be after publication; for in such a case the Court must have the opportunity of looking into the depositions. I must grant the present motion, but the defendant shall have his costs of appearing upon it.

ORDER :—Let the plaintiff be at liberty to re-examine the said John Gleeson to interrogatories to which he has been already examined, saving all just causes of exception as to the admissibility of his evidence;* and let the plaintiff pay to Lord Sandwich £4 for the costs of this motion.

(a) 2 Swst. 401.

(b) *Ante*, p. 336.

* See the case of *Watson v. Pim*, *ante*, p. 344, and *Nightingale v. Dodd*, Amb. 816.

1841.
Bankruptcy.

In re MULLEN, a Bankrupt.

(In Bankrupt Court.)

Feb. 23.

In this case a creditor appeared to prove on the estate for bills of which the bankrupt was the drawer, and of the dishonour of which no notice had been given to the bankrupt, or to the assignee after the bankruptcy.

A creditor will not be permitted to prove upon the bankrupt's estate for bill or notes if notice of dishonour be not given to the bankrupt before the bankruptcy, or to the assignees subsequently

Mr. Commissioner MACAN.

The invariable practice of this Court is to reject proofs of bills or notes, if notice of dishonour be not given to the bankrupt before the bankruptcy and the choice of assignees, and subsequently to the assignees if chosen.

Proof rejected.

Ex parte WYSE, In re WYSE.

(Chancery.)

Chancery.
April 16.

THE petitioner was found bankrupt in September 1833. The facts of the petition were these:—In May 1833 the petitioner went to New York, for the purpose of superintending the sale of brandy and wines, which he had previously exported, amounting in value to £5000. He left considerable property in Ireland, and had the fullest intention of returning home on the completion of his business in America. During his stay in Philadelphia, whither he went for the purposes of mercantile transactions, he was arrested upon the 3rd August 1833 at the suit of Puget, Bainbridge & Co., and during his imprisonment a detainer was lodged by a creditor of the name of Thomas Methold Waters, of London, and subsequently detainers by other creditors. The petitioner continued imprisoned in the Debtors' Prison in Philadelphia until the 30th January 1834, when he was released from custody by the determination of suits instituted against him by Waters and the other creditors, verdicts having been had, and judgments entered up for the defendant with costs. The petitioner's property, in value about £5000, which was left by him in the care of his consignees in New York, was seized by the creditors, and afterwards held under attachment; and another suit was instituted by them in the Court of Chancery in New York, for the recovery of the same alleged debt for which petitioner was confined in Philadelphia. The result of this suit was also in his favour. The petitioner then went on to state a number of legal proceedings

Application by bankrupt after an absence of eight years in America, to be at liberty to surrender himself to the Commission and pass his final examination, *refused*. The petitioner not having used due diligence since his return in communicating with his assignee or seeking personal interviews with his creditors.

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by which his affairs became complicated and embarrassed during his stay in America, thereby accounting for his not being enabled to appear to the commission of bankrupt within the time limited by the statute. He returned to this country in October 1837, and shortly after his arrival he addressed a circular letter to the major part of his creditors, expressing his readiness to surrender to the commission, and subsequently went to London, where he endeavoured to effect a negotiation with the creditors, but which was not satisfactory in its results.

The petitioner prayed for an order to be permitted to surrender himself and pass his final examination.

Messrs. *G. W. Creighton* and *J. Dwyer*, for the petitioner.—The matter of this petition was moved by *Mr. Dwyer*, in Chamber, but his Lordship ordered it to be heard upon the next Bankrupt Day. The records of the Bankrupt's Office, in the mean time, were searched, and a few cases had been found, in which petitions had been presented somewhat similar in their circumstances to the present, and orders were made permitting the petitioners to surrender themselves. *In the matter of John Carleton (a)*, the petition merely stated, that the petitioner was unable to attend before the Commissioners on the appointed day, having been obliged to quit the country; and the Court ordered that the petitioner should be at liberty to appear before the Commissioners of Bankrupt, and finish his examination. *In the matter of Pim Nevin (b)*, the petitioner had been arrested upon the day before that appointed for his final examination, and continued, up to the time of presenting his petition, in custody. The order in this case was, that the petitioner should be permitted to pass his final examination. There is an analogy between *Nevin's* case and the present, in respect to the custody of the party, and his inability to surrender himself.—[The LORD CHANCELLOR. Does the petition impute any incorrect proceedings upon the part of the Commissioners or the assignees, and was there any effort shewn by the petitioner to give information with respect to the property he left in Ireland?—There is no imputation against either the Commissioners or assignees. In consequence of the death of the former agent of the commission, there was a difficulty in having access to the file: and it was also supposed that the bankrupt had no right to inspect the documents relative to the estate until he had made himself amenable to the Commission. With respect to the lapse of time that has taken place in presenting the petition, there is one reported case, *Ex parte Molloy (c)*, where the petitioner was found bankrupt in 1810, but before

(a) Petition presented 23th June 1818.

(b) Petition presented 10th August 1833.

(c) *Molloy*, 70.

he passed his final examination went to America. After eighteen years had elapsed, he petitioned the Court for liberty to go before the Commissioners and pass his final examination. The Court ordered that the petitioner might, at his own peril, surrender to the commission, but intimated that the order would not exempt him from the penal consequences of the statute. Wyse does not labour under any legal disability; his absence was not voluntary; and there was no intention upon his part to commit an act of bankruptcy. He has always expressed a readiness and anxiety to submit himself, and the facts of the petition satisfactorily account for his inability to surrender himself within the limited time.

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The LORD CHANCELLOR.

I never had any doubt as to my being enabled to make an order in this case. The statement upon the face of this petition is not at all satisfactory. The petitioner enters into a detailed account of certain adventurous speculations in which he engaged himself during his residence in America; but he has not shewn me that he used due diligence in communicating with his assignee or his creditors since his return. It appears that although he addressed a circular letter to the major part of his creditors, he did not seek a personal interview with any of them. I will not, therefore, under these circumstances, make any order—at the same time, this will not prejudice a new petition being presented, if the bankrupts can supply the deficiencies I have alluded to.

In re ARTHUR O'CONNOR.

(*Bankrupt Court.*)

In this case, the solicitor to the commission and assignee applied to the Court for liberty to sell the debts returned by the bankrupt in his schedule as due to him. It appeared that considerable difficulty was experienced in ascertaining the nature, amount and circumstance of these debts; the parties, upon being applied to for payment, not having afforded the agent any information with respect to them; and the difficulty complained of was increased in consequence of their residing at a remote distance.

Mr. Commissioner MACAN,

In refusing to permit the debts to be sold, expressed his determination of establishing a practice in the Court, of issuing a summons in every

debt; and if the debt be not due, an acquittal can

May 21.
Bankruptcy.

If upon application for payment by the agent of the assignee to a party returned as debtor to the bankrupt, no satisfactory explanation be given, a summons will be issued, requiring the party to attend at his own expense before the Commissioners, and give every information with respect to the debt he proved of it.

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case where, after an application by the agent of the assignee to the party indebted, any difficulty was found in collecting the debts due to the bankrupt. Persons who would be ashamed to deny their debts to the bankrupt when he was solvent, upon being applied to, after the bankruptcy, for the amount by the agent, either denied being indebted altogether, or refused to give any information with respect to them. The party summoned will be required to give every information as to the debt; and if it be not due, he will be thus afforded an opportunity of proving his acquittance of it. The 48th section* of the present Bankrupt Act considerably enlarges the powers which were provided by the former Bankrupt Acts. The mere supposition of a party being indebted to the bankrupt's estate supplies sufficient authority to the Commissioner to issue a summons.

The Solicitor then inquired of his Honor, whether he should tender a viaticum to the parties summoned?

It is discretionary with the Commissioner to give any costs or charges to the summoned party suspected of having bankrupts' property, or supposed to be indebted to the bankrupt.

HIS HONOR said, that the 48th section leaves it quite discretionary with the Commissioner to give any costs or charges to the parties summoned. The provisions of that section also did away with the distinction which has arisen, as in the case of *Ex parte Roscoe (a)*, between a party summoned as a witness, and that of a person suspected of having any of the estate of the bankrupt in possession.

(a) 1 Mer. 188.

* Sec. 48.—“And be it enacted, that where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the said Commissioner, every such person shall have such costs and charges as the said Commissioner in his discretion shall think fit; and every witness summoned to attend before the Commissioner shall have his necessary expenses tendered to him, in like manner as is now by law required upon service of a subpoena to a witness in an action at law.”

NOTE.—The marginal note to this section is thus worded:—“Persons suspected to have bankrupts' property to have costs for their attendance. Witnesses to have expenses tendered.” It would appear from the meaning of the section, that the marginal note should be, “Persons suspected to have bankrupts' property, to have such costs for their attendance as Commissioner thinks fit—witnesses to have their expenses tendered.”

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*Rolls.*ALVEN *v.* BOND.*(In the Rolls.)**April 20.*

THE bill in this cause prayed the foreclosure of a mortgage and sale of the lands of Coolattra and Cavancreevy in the county of Monaghan, for payment of the sum due, &c. On the 3rd of November 1838, there was a final decree for a sale, under which the lands were set up for sale on the 8th of December 1840, and Mr. Robert Murdock, one of the solicitors, was declared the purchaser at the sum of £3600.

On the 14th of December 1840, Murdock, having lodged one-fourth of the purchase money, obtained the usual rule to confirm the sale unless cause in eight days after service of the order.

On the 12th of January 1841, Mr. Edward Bond, the eldest son and heir apparent of the principal defendant in this cause, moved on notice of the 28th of December 1840, to open the sale upon an advance of £200, and the Master of the Rolls ordered that (the said Edward Bond undertaking to bid the sum of £200 more than the sum of £3600, the amount of the former bidding, and to deposit the same in the bank of Ireland to the credit of this cause within six days from the date of the said order, and also to pay the said Robert Murdock, the former purchaser, the amount of his interest and all costs out of pocket) the Accountant General should be at liberty to receive the said sum of £200 or a transfer of stock equivalent thereto, with the approbation of the Master, and place same to the credit of this cause with the privity of the said Accountant General; and upon such transfer or lodgment being made, it was further ordered that the former sale should be set aside, and that said Master should proceed to a new sale according to the course of the Court; and that the said Accountant General should draw on the Governor and Company of the said bank, in favour of the said Robert Murdock, or of his attorney, &c., for the amount of his deposit, being £900; and that it should be referred to the said Master to ascertain his interest and tax his costs out of pocket, including his costs of appearing on this motion; and that the said Edward Bond should pay the same forthwith according to his undertaking. And if the said Edward Bond should be declared the purchaser, it was further ordered that he should have credit for the said sum so to be deposited or transferred by him, as part of his purchase money. And in case the said sum of £200 should not be so deposited or transferred within the said six days, it was further ordered that the said Robert Murdock should be at liberty to have the sale to him confirmed, as if this order had not been made; without prejudice, however, to his right to be paid his costs by the said Edward Bond; and that the said

Sale under decree set aside after confirmation, on the ground that the purchase was made in trust as to one-third for the receiver in the cause, and as to another one-third for the father of the said receiver; and the purchaser was disallowed interest on the purchase-money lodged by him and all costs incurred by him in investigating the title, and in relation to the sale, &c.

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Accountant General was to take notice that the said cash so ordered to be paid out was free of the Usher's poundage (a).

On the 20th of January 1841, the said sum of £200 not having been lodged or transferred within the time limited by the foregoing order, Mr. Murdock obtained on the usual documents (b) an absolute rule confirming the sale to him.

On the 28th of January 1841, Counsel moved on behalf of Edward Bond, that the foregoing order of the 20th of January 1841, absolutely confirming the sale to Murdock, might be rescinded, and that the said order of the 12th of January 1841, for opening the sale might be renewed. The motion was grounded upon an affidavit of Mr. Bond's solicitor, in which it was stated that, in September 1839 the defendant Henry Coote Bond had conveyed to his son Edward Bond all his right, title and interest in the lands in the pleadings and decree mentioned, and in several other lands of which he was seized in fee, and producing altogether about £1300 per annum, to the intent that the said Edward Bond should forthwith raise a sum of money sufficient to pay the defendant's debts, including the demands in this cause, and make a certain provision for the said defendant and his younger children, and subject thereto, to the said Edward Bond and his heirs for ever. That, pursuant to the provisions of the said deed, an application had been made by Edward Bond to Mr. Robert Maunsell, one of the solicitors, for a sum of £11,000 on mortgage of the said estates, to pay off the said debts; and that Maunsell had agreed to lend the money at £4. 10s. per cent. upon being satisfied as to the title. That Mr. Pennefather had approved of the title on Maunsell's part, subject to certain searches, all of which had since been furnished; and that the only encumbrances which thereby appeared as grounds of objection to the title, were those about to be paid off under the decree in this cause. That the draft deeds had already been approved by Counsel on behalf of all parties; and that the money was lying in bank ready to be paid over. That previous to the said order of 12th of January 1841, deponent had frequent interviews with Murdock, and apprised him of the loan about to be obtained, and how matters then stood; that Murdock stated he was willing to have the sale opened, and not anxious to complete it, but would accommodate Mr. Bond in any way in his power. The affidavit further referred to two letters from Murdock to deponent, bearing date respectively the 23rd of December 1840, and 7th January 1841, in which Murdock requested of deponent to point out to him in what manner he could save

(a) See *Johnson v. Reardon*, ante, 200.

(b) Viz.—the rule nisi, an affidavit of the service of it, the Registrar's certificate of no cause shown, and the Accountant General's certificate of the remaining three-fourths of the purchase money having been lodged.

Mr. Bond expense, and facilitate him in accomplishing the loan already referred to; and also stating that if it would enable Mr. Bond to complete the loan, he would undertake for a limited time not to pay in the remaining three-fourths of his purchase-money. The deponent further stated, he was under the impression that the order of the 12th of January 1841, for paying in the £200, was a ten-day order; that shortly after the said order was pronounced, deponent was obliged to leave town on pressing business, but left directions with his clerk to take out the order as soon as possible; and that on deponent's return to town on the evening of the 20th of the same month, he found his clerk confined to his bed. That on the following day, deponent got out the order and went to the Accountant General's office for the purpose of arranging the transfer of the said £200, and then discovered that Murdock had, without any notice to deponent, taken his earliest opportunity of confirming the sale on the previous day. That by Murdock's promises, deponent had been led to believe he would not have proceeded to confirm the sale without giving notice of his intention, and that the said sum of £200 was then ready to be paid into Court.

Mr. Murdock appeared upon the motion, and admitted the communications and letters referred to in the preceding affidavit; but stated, as was admitted upon the other side, that when he had expressed his willingness to facilitate Mr. Bond's arrangement by the intended loan, and not to confirm the sale, it was upon the terms that no risk should be imposed upon him, and that Mr. Bond's arrangement should be made within a limited time. That the order of the 12th of January 1841 was afterwards obtained; and as the £200 advance upon the former bidding was not paid in within the time limited, he deemed it necessary to confirm the sale, in order to secure himself against the risk of an attachment for not doing so. He again stated that, for his own part, he was not anxious to hold the purchase, which he said could scarcely be considered as cheap, inasmuch as it appeared by the rental that the number of acres was 290, with seventy-four pauper tenants upon them; but he added, that others as well as himself were concerned in the purchase, and as it had been confirmed, he did not then feel himself at liberty to forego it.

The MASTER OF THE ROLLS said, that no case had been made to justify the interference of the Court, and he accordingly refused the motion; but, under the circumstances, his Honor was pleased to express a hope that as it was alleged the lands had been sold at an under value, Mr. Bond might be able to prevail upon the good feelings of the purchasers, and induce them not to insist upon their strict rights.

A further application was now made on behalf of the said Edward

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Bond, that the sale to Murdock might be set aside on the grounds, first, of misrepresentation in the rental, whereby the quantity, quality and annual rents of the lands were under-stated, and the sale was at considerable undervalue; second, that Murdock had purchased in trust for the receiver in the cause and his father; third, that full and public notice by advertisement in newspapers in general circulation in the county where the lands are situate or the adjoining counties was not given previous to the said sale.

It appeared from the affidavits made in support of this motion, that in December 1838, Hugh Swanzy, one of the solicitors of this Court, whose general residence was in the county of Monaghan, within a few miles of the lands in question, was appointed the receiver over them in this cause, and that Henry Swanzy, the receiver's father, was entitled to a small fee-farm rent payable out of the same lands, and some years ago sought to purchase them from the defendant H. C. Bond. It now distinctly appeared and was admitted that Murdock had purchased, in trust as to two-thirds for Henry Swanzy and his son Hugh Swanzy, the receiver; that each was interested in one-third of the purchase, and had each contributed one-third of the purchase money.

It further appeared that there was a vein of lead in the lands, and that on the 8th of February 1840, an agreement had been entered into between Edward Bond and an English mining company, for the opening of a mine in the lands of Coolatra and working it for three years, upon the terms that the said Edward Bond should have one-tenth of the produce clear of all deductions. That a shaft had accordingly been sunk and the other necessary preparations made with all due diligence and at very great expense; that several tons of lead from the mine had been shipped in the course of the last year; that deponent Edward Bond was in daily expectation of receiving an account of the profits; and that the manager of the said mine had given the said deponent to understand that his share of the produce would be of the value of £600 per annum.—No mention was made of this mine in the rental or advertisement of the lands.

It appeared that the seventy-four tenants upon the lands, mentioned on the former motion, were tenants at will.

It further appeared that in the rental, prepared by the plaintiff's solicitor according to the information given by the receiver Hugh Swanzy, the lands were stated to contain only 290 acres Irish plantation measure, and to yield an annual income of £321. 2s. 9d., whereas it was now sworn that the actual quantity of the lands was 342A. 3R. 35P., Irish plantation measure, and that it appeared by the rental made previous to the appointment of the said receiver, that the yearly rents of the said lands amounted to £370. 18s., independent of the further additional income that should arise from forty acres of bog on the said lands, which, being very valuable

for fuel in that part of the country, would, it was stated, produce an annual acreable rent of at least £4; but neither the said turf-bog nor the mine was mentioned or alluded to in the rental or advertisement for the sale of the said lands.

It also appeared that at the sale, although Murdock was, in fact, bidding in trust for Hugh Swanzy the receiver, and Henry Swanzy his father, the said Henry Swanzy attended and bid the sum of £3000; and that the fact of the purchase having been made in trust for the Swanzy's was not discovered for some time after the sale was confirmed.

The receiver Hugh Swanzy made an affidavit, in which he stated that when he was appointed receiver, the only guide he had as to the rents to be received and the tenants' holdings, were the accounts furnished and passed by the former receiver, as the defendant H. C. Bond had refused to furnish a rental. That when applied to by the plaintiff's solicitor for the particulars of the said lands, deponent returned all the information in his power after the most anxious inquiry. That the rental prepared by the plaintiff's solicitor was correct, according to the best of deponent's belief and means of knowledge. He admitted, that in addition to the quantity of land mentioned in said rental as occupied by the tenants, there were forty acres of bog, which were not mentioned; but stated that the same was in possession of the tenants, as appurtenant to their holdings; that it would be impossible for them to pay their rents without it; and that the said bog was in a great measure exhausted, and was not more than enough to supply the tenants with fuel; that it never had been a source of profit in addition to the rental of the said lands, and could not be made so without greatly impoverishing and oppressing the tenants. That deponent never heard of the rental mentioned in Bond's affidavit, by which it was stated that the rents amounted annually to £370. 18s.: that the amount of the rents as stated in the rental returned by deponent to the plaintiff's solicitor and set forth in the advertisement for the sale of the said lands was, as deponent believed, more than could ever be actually received from the lands in their present state, as the tenants were wretchedly poor, and it appeared by the former receiver's account that he had not been able to obtain more than £230 *per annum*; and although deponent had made every exertion and used measures to enforce the rents, he had not been able to get in more than £230, for the year 1839, as appeared by his account passed for that year, and that he had not since been able to induce the tenants to pay more than £140.

That he had never heard of any survey of the said lands having been made by Edward Bond or any one on his behalf, but that after reading the said Bond's affidavit, deponent referred to the Ordnance survey, by which it appeared that the townland of Cavancreevy contained 221 English acres, exceeding by eight English acres the quantity stated in

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the rental prepared by deponent, and that the difference, as deponent believed, arose from the measurement in the one being made of the entire townland, including two roods and the mearings of the said farms which could not be included in measurement to the tenants. That it further appeared that the townland of Coolartra contained 334 English acres, exceeding by about 70 English acres the number returned in the rental prepared by deponent; but that before the said rental was prepared, deponent was informed by the tenants on the said lands and others in the country, and believed it to be true, that the Ordnance survey included all within the ancient townland of Coolartra, a considerable portion of which had not been for many years in the possession of the Bond family, but in possession of the owners of the neighbouring estates, and also included the said bog which the tenants held as appurtenant to their land.

That at the time when the said rental was prepared by deponent he was not aware of any lead mines having been discovered on the lands of Coolartra, but deponent was aware that lead ore had been found on the neighbouring townlands. That various experiments had been made in that part of the country for the discovery of ore, and in some instances mines had been worked for a short time, but that in every instance the experiments had failed, with heavy loss, and the mines been abandoned as unprofitable. That, as deponent believed, the shaft had not been sunk on the lands of Coolartra until after the rental had been prepared and furnished by him; and that the existence of the mine was particularly mentioned to the several persons who attended at the sale of the said lands.

That after the said rental had been printed and posted, this deponent had several interviews with the defendants Edward Bond and his father H. C. Bond, and that neither of them had made any objection to, or suggested that there was any misrepresentation or inaccuracy in it. He admitted that he was interested in Murdock's purchase to the extent of one-third, but positively declared that neither he nor his father, as he believed, had the least intention of becoming the purchaser of any part of the said lands until a day or two before the sale, when deponent's father spoke to him on the subject.

Henry Swanzy, the receiver's father, and also a solicitor, made an affidavit, admitting that he was interested in Murdock's purchase to the extent of one-third, and repeating his son's statement as to not having had any intention of becoming a purchaser until a day or two before the sale; and further stating, that inasmuch as he had a fee-farm rent of £10 out of the lands, he had been willing to give more for them than it was likely any stranger would.

Murdock admitted that he had purchased in trust as to two-thirds for Henry and Hugh Swanzy, and one-third for himself.

Mr. *Warren*, Q. C., with whom were Mr. *Brewster*, Q. C., and Mr. *Armstrong*, for the motion, said that no blame was to be imputed to the plaintiff's solicitor, who had prepared the rental of the lands and proceeded to the sale of them with due care and diligence; but that the receiver in the cause, who now appeared to be one of the purchasers, had been guilty at the least of culpable neglect in the manner in which the rental furnished by him to the plaintiff's solicitor had been prepared. They insisted that the sale should be set aside on the ground of misrepresentation, and especially on the ground of the purchase having been covertly made in trust, as to one-third, for the receiver in the cause, and as to another one-third for the receiver's father. If the Court should set aside this fraudulent purchase, every thing was now ready to complete the loan from Maunsell, so that all the demands in this cause would be discharged immediately.

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Mr. *Wm. Brooke*, Q. C., and Mr. *Butt*, for the purchasers, submitted that no blame whatever should be thrown upon the receiver, who had used his best endeavours to make out a complete rental; that if the rental furnished by him was in any degree defective or inaccurate, the fault was that of the Messrs. Bond, who possessed the necessary information and purposely withheld it; and that where there was no ground for charging the receiver with the least fraud or misconduct in the transaction, the circumstance of his being interested in one-third of the purchase was no reason for setting aside the sale and endangering the fund.

Mr. *Blake*, Q. C., and Mr. *Hughes* for the plaintiff.

The following cases were cited in the course of the discussion:—*O'Connor v. Richards* (a); *Ex parte James* (b); *Watson v. Birch* (c); *Price v. Moxon* (d); *Ex parte v. Hughes* (e); *Wren v. Kirton* (f); *Ex parte Lacey* (g); *Maher v. O'Shaughnessy* (h); 1 *Sugd. Vend. & Purch.* 124, 232; *Cary v. Cary* (i); *White v. Tommey* (k).

The MASTER OF THE ROLLS, in delivering his judgment upon this case, observed upon the serious omissions in the printed rental according

April 27.

(a) *Sausse & Sc.* 246, and the cases there cited. (b) 8 *Ves.* 347.

(c) 2 *Ves. jun.* 54. (d) Stated in *Watson v. Birch*, 4 *Bro. C. C.* 173.

(e) 6 *Ves.* 616, 624. (f) 8 *Ves.* 502.

(g) 6 *Ves.* 630. (h) Stated in *Smith on Receivers*, p. 63. (2 ed.)

(i) 2 *Sch. & Lef.* 173.

(k) Not reported.—See the cases collected in the note to *Bowen v. Kirwan*, L.L. & G. temp. *Sugd.* p. 74 *et seq.*

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to which the lands were set up to be sold, and censured the conduct of the persons concerned in the purchase, but declared that his order was mainly grounded upon the fact that the purchase had been made in trust as to two-thirds for the receiver in the cause, and his father. His Honor said that it is the duty of a receiver to render the estate over which he is appointed as productive as he can; and that it is the duty of the Court, whose officer he is, to take care that he does so. That although in the present case the Messrs. Bond were to blame for not giving information, and were therefore not entitled to costs; and although the receiver might not be chargeable with any positive misfeasance or intentional omission of material matters in the preparation of the rental, yet this case shewed what very serious mischief might follow if a receiver in the cause were permitted to be a purchaser under the decree—if he could have an interest in depreciating that estate, the value of which it was his duty to enhance. Such an interest might extend far beyond the preparation of the rental; it might be the operative principle during the whole term of the receivership; therefore in no case would the Court sanction a sale to the receiver, unless it clearly appears that it would be for the benefit of the parties in the cause to hold him to his purchase.* His Honor then made the following order:—

ORDER:—That the sale of the lands of Coolartra and Cavancreery made under the decree in this cause on the 8th of December 1840, to Robert Murdock, Esq. (which lands appear to have been then purchased by him in trust as to one-third thereof for Hugh Swanzy, the receiver in this cause, and as to another one-third for Henry Swanzy, the father of the said receiver) be and the same is hereby set aside; and it is further ordered that J. S. Townsend, Esq., the Master in this cause, do proceed to a re-sale of the said lands, and that previous to such re-sale he do settle and approve of a proper rental of the said lands, having regard to the matters stated in the said affidavits. And, the plaintiff by his Counsel in open Court so consenting, it is further ordered that such re-sale be not had until after the expiration of one month from the date of this order; and it is further ordered that the said plaintiff be at liberty to charge the cost of this motion as part of his costs in this cause; and that the said Robert Murdock do abide his own costs of this motion and in relation to said sale, and the investigation of the title to said lands: the Court refusing to allow him any portion of such costs or any

* The Reporter was unavoidably absent when the Master of the Rolls delivered his judgment in this case, and the above statement of it is given *ex relatione*.

interest on the money paid by him into Court on account of the purchase-money of the said lands; and it is further ordered that the said defendants Henry Cooté Bond and Edward Bond do abide their own costs of this motion.*

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* Soon after the above order was pronounced the loan was effected, and all the demands in this cause were discharged; whereby the necessity of a re-sale was avoided.

THOMAS GEORGE BUCKE, *Petitioner*;
HENRY MURPHY, . . . *Respondent*.

Feb. 12.

THE petition in this matter stated that the late Hercules Lord Langford departed this life in Margaret-street, Cavendish-square, London, on the 4th of June 1839, having previously made his will, bearing date the 19th of September 1836, whereby he devised to Robert Smyth and John Winter Jones, Esquires, their heirs and assigns, all his freehold and other estates in England, Ireland, or elsewhere, as trustees for the purposes

A Solicitor having answered the matter of a petition against him, pursuant to an order of the Court, is not entitled to move that the petition be dis-

missed with costs, for want of prosecution, until one clear Term has elapsed after notice of the answering affidavit.

M. being solicitor and general law agent for L., and having lately received from him £3000 in full discharge of all demands for costs, &c., lent him £500, for which the latter passed his bond and warrant, but subject as now alleged to an agreement, that judgment was not to be entered upon the bond, and that the loan was to be repaid out of a sum of £600 which M. was about to receive as L's attorney on account of the fine for a lease to be granted by L.—M. received the £600 as attorney for L., and retained out of it £500; but L. having died soon afterwards, M., in two days after L's death, entered judgment upon the bond, and assigned it for full and valuable consideration, and the amount was now claimed by the assignee out of L's estate. It was not alleged that L. had incurred any further liability for costs to M. after payment of the £3000.

L. had little personal property but was seized of large real estates, and by his will devised all his property to trustees, and appointed a sole executrix who proved the will.

Upon a petition presented by the sole acting trustee of the will, without the executrix, stating the foregoing facts as to the loan and agreement between M. and L. &c., and setting forth a letter purporting to be from M. to L., and of equal date with the bond, as evidence of the agreement, and praying that M. might be ordered to pay over the £500 part of the £600 received by him, in satisfaction of the judgment: *Held*, that the Court had jurisdiction to make the order; but M. having positively sworn that the letter stated in the petition and afterwards exhibited to him before making his affidavit was a forgery, and contrary to the agreement between him and L., which, as he alleged, was that the £500 part of the said £600 was to be retained by him on account of an accommodation bill for £500 which he had accepted for L., and not in repayment of the loan for which the bond was passed; and it appearing that such alleged bill, though it must have been more than a year and a half over due, had never been presented for payment either to M. or to the trustees or executrix of L's will, and it not appearing that such bill had ever been negotiated or in whose hands it now was, the Court directed an issue to try the question whether the letter stated in the petition was in M.'s handwriting or not; and the jury having found that it was in his handwriting, the Court ordered M. to pay the amount of the judgment so entered and assigned by him, together with the petitioner's costs of the issue and of the several petitions in this matter.

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therein mentioned; and in case of the death or refusal to act of both or either of the said trustees, the testator by his said will gave a power to Mrs. Anna Maria Little, therein named, to appoint a new trustee or trustees in the place or places of him or them so refusing to act, and of his said will appointed the said Anna Maria Little sole executrix.

That the said Anna Maria Little duly proved the will; and the said John Winter Jones having duly renounced and disclaimed all right, title and interest as trustee under the said will, the said Anna Maria Little appointed the petitioner as trustee in his stead, under the power in the will contained; and by indenture of the 6th November 1840, the said Robert Smyth and John Winter Jones conveyed all and every part of the said trust estates to the petitioner, who was now the sole acting trustee under the said will.

That for some years before and down to the time of the death of the said Lord Langford, the respondent was his solicitor in this country; and that previous to the 2nd of April 1839, his Lordship, having occasion for a sum of £500, applied to the respondent to procure it for him; and that the respondent having succeeded in doing so, Lord Langford executed to him his bond in the penal sum of £1000, conditioned for payment of the said sum of £500 with interest, with a warrant of attorney for confessing judgment thereon. That the said bond and warrant were prepared by the respondent, who was then the confidential solicitor of Lord Langford; and that it appeared by a letter of the respondent addressed to Lord Langford and dated the 2nd of April 1839, that it had been agreed by and between the respondent and his Lordship, that the respondent was to repay himself the said sum of £500 out of a sum of £600 which the respondent as Lord Langford's solicitor was then about to receive from one Rogers, a tenant of part of the Langford estate, as part of the consideration or fine of a lease, which the respondent had as such solicitor agreed should be made by Lord Langford to the said Rogers; and that it was further agreed between Lord Langford and the respondent that no judgment should be entered upon the said bond.

As evidence of such agreement, the petition set forth *in hæc verba* three letters from the respondent to Lord Langford: the first dated 'February the 5th 1839,' stating a negotiation then pending between the respondent and Rogers, respecting a lease of part of Lord Langford's estate in the county of Meath, and Rogers' offer of £750 per annum, and the sum of £500 as a *present* to Lord Langford when he should execute the lease: the second, dated 'Ash-Wednesday,' stating more particularly the terms of the proposed agreement with Rogers respecting the said lease for three lives or thirty-one years, in consideration of a rent of £750 per annum, and £600 cash to be paid down as a fine—Lord Langford remitting the tithe rent-charge;—advising Lord Langford upon receipt of this letter to send the respondent a letter of agreement for

Rogers according to the form given by the respondent, and embodying the foregoing terms; and further stating that of course the respondent would not part with such letter of agreement without the money: the third, being the letter of the 2nd of April above mentioned, was the material document in the present matter, and was in the following words:—

“Hume street, 2 April, 1839. My dear Lord, the bond conditioned “for payment of £500, which your Lordship has this day passed to me, “is to be satisfied by me on receiving the amount thereof with legal interest from Rogers’ sum of £600.—H. Murphy.”

The petition further stated that on or about the 20th of April 1839, the said respondent, in his character of solicitor for Lord Langford, or Messrs. Guinness and Co. on his behalf as such solicitor, received from the said Rogers the said sum of £600; and that the petitioner had lately discovered that notwithstanding the payment of the said sum of £600 to the respondent or on his behalf as such solicitor, and in violation of his said agreement, the respondent had on the 6th of June 1839, just two days after Lord Langford’s death, entered judgment on the said bond, and on or about the same day assigned the said judgment to one Mrs. Maria Smith, who now claimed the amount thereof out of the real and personal estate devised by Lord Langford upon the trusts of his said will.

The petition further stated that the respondent could not pretend or allege that on the 2nd of April 1839, when the said bond was given, the said Lord Langford was indebted to him in any other sum or sums of money than the amount of the said bond, in as much as prior to the said 2nd of April all accounts between Lord Langford and the respondent had been settled; and as evidence thereof the following letter from the respondent to the petitioner in this matter was set forth:—“Kilmurray Grove, “Delgany, October 31st 1840. Dear Sir, some months before Lord “Langford’s decease his Lordship and I settled all our accounts on foot of “which he was indebted to me in full for every thing, to that date, in “three thousand pounds; which sum his Lordship paid to me by bills on “Mr. Guinness, which that gentleman discounted under his Lordship’s “directions, on the terms of getting an assignment of my judgment “against his Lordship for £7000 odd hundred pounds; which assignment “I have accordingly executed since this settlement. When I next went “to London I lent his Lordship £500 in five bank of England notes of “£100 each, for which his Lordship passed me his bond; and since the “date of our settlement little or no costs comparatively speaking have “been incurred, save in the suit of the Crown for a portion of the county “Dublin estate, with which Mrs. Bennett* has nothing to say.—Henry “Murphy.”

The prayer of the petition was that the respondent should be ordered

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to pay over the sum of £500 part of the said sum of £600, in discharge of the said judgment, or procure satisfaction to be entered upon it; or, that the Court should make such other order in the matter as it should deem meet and proper.

On the 25th of November 1840, the Master of the Rolls was pleased to order that the respondent should answer the matter of the petition and affidavit in four days after the service of the said order; and that the petitioner should produce in the office of his solicitor the several original letters referred to in the said petition and affidavit for the inspection of the said respondent, on receiving one day's notice in writing for that purpose.

On the 4th of December 1840, pursuant to the foregoing order, the respondent filed an answering affidavit, stating that on the 23rd of February 1839, all accounts down to that date had been settled between him and Lord Langford, and that the sum of £3000 having then been ascertained to be due to him from Lord Langford, his Lordship gave to deponent three acceptances for £1000 each, which were afterwards discounted by Messrs. Guinness and Co., with the assent and by the directions of Lord Langford, on the terms of deponent's assigning to Guinness and Co. a judgment obtained by him against Lord Langford for the sum of £7384. 12s. 2d; and that the said judgment was accordingly assigned to Guinness and Co.

That about the same time the agreement with Rogers respecting the lease was concluded, and that deponent was authorised as Lord Langford's solicitor to receive from Rogers the sum of £600, being the fine payable in respect of the lease; but that it was then uncertain whether possession of the farm could be given to Rogers for some months, and that Rogers declined to pay the fine until he got possession of the farm.

That on the 1st of March 1839, Lord Langford having entered into a negotiation for a loan of £75,000 on mortgage of his estates, solicited deponent to relieve him under some pressing difficulties, by accepting his draft for £500, which he said he could get immediately discounted, and by giving an undertaking to lend the further sum of £500 in cash within a time limited—"the former to be paid out of Rogers' money (being the "fine of £600), and the latter out of the £75,000 then being negotiated "for." That on the 7th of March 1839, the deponent, being then in London, accepted Lord Langford's draft for £500, payable in four months from that date; whereupon the following memorandum was signed and given by Lord Langford to deponent:—"Lang's Hotel, March 7th 1839. "Mr. Murphy has this day given to Lord Langford his (Mr. M.'s) acceptance of his Lordship's draft payable with interest in four months "from this date; which being for his Lordship's accommodation, Lord "Langford hereby undertakes to provide for, unless in the mean time he "shall have supplied Mr. M. with funds to take it up.—Langford." That

at the same time, deponent gave a promise to lend Lord Langford a further sum of £500 in cash within twenty-one days. That according to the promise so given, deponent on the 2nd of April 1839, handed to Lord Langford in London, and in the presence of his Lordship's English solicitor, the sum of £500, in five Bank of England notes of £100 each; for which loan Lord Langford then passed his bond to deponent, at the same time requesting him not to enter judgment on it until every thing was settled with the mortgagee. "That no reference was then made to "Rogers' money, which was intended by the said Lord Langford and "this deponent to be allocated to the said bill of £500, and for payment "of which the said fine was considered the only provision on which they "could securely calculate; while the bond was intended to remain out- "standing until the mortgage transaction of £75,000 was completed, "which it was not expected could be finally arranged for several months."

That deponent left London on his return to Ireland on the 2nd of April 1839: that he never wrote or authorised the letter dated "Hume- "street, 2nd of April, 1839," in the petition in this matter set forth; and that same was a forgery, and altogether at variance with the agreement between Lord Langford and deponent, as to the application of the fine of £600 to be paid by Rogers for the lease.

That on the 20th of April 1839 (deponent having left Dublin for London on the preceding day), Rogers lodged to deponent's credit with R. S. Guinness & Co., deponent's bankers, £250 in cash, and a bill for £350, on account of the said fine of £600, from which bill the bankers deducted the sum of £5. 5s. 2d. for discount on placing it to deponent's credit, leaving the nett sum so lodged £594. 14s. 10d. That on the same day deponent arrived in London, and remained there until the 3rd of May following, and before leaving London settled with Lord Langford the balance due to him by this deponent on foot of the £600 of Rogers' said fine.

The deponent admitted that upon hearing in Ireland of Lord Langford's death, and believing, as the fact turned out to be, that the negociation for the loan of £75,000 should be thereby entirely interrupted and put a stop to, he immediately caused judgment to be entered on the bond, and afterwards having occasion to borrow £500 from Mrs. Smith, in the petition named, assigned to her the said judgment with other collateral securities for the re-payment of the said £500.

That the three bills for £1000 each, accepted and passed by Lord Langford to deponent, and discounted by Guinness and Co., fell due since his Lordship's death and were still unpaid; and that as each of them fell due, deponent was called upon by Guinness and Co. to pay the amount thereof; and that notwithstanding the assignment from deponent to Guinness and Co. of the said judgment against Lord Langford for £7384. 12s. 2d. on account of the said bills, Guinness and Co. still claimed to be entitled to sue deponent for the amount of the said bills.

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A clear Term must elapse after notice of the answering affidavit, before the respondent can be entitled to have the petition dismissed with costs, for want of prosecution.

On the 23d of January 1841, Counsel for Murphy moved the prayer of a petition presented by him, that the matter of Bucke's petition might be dismissed with costs for want of prosecution, no further step having been taken down to that time by the said Bucke, since the said Murphy gave notice of having filed his answering affidavit. But the Master of the Rolls held that the application was premature; and that, according to the practice in such cases, a clear Term must elapse after notice of answering affidavits, before the respondent can be entitled to have the petition dismissed with costs for want of prosecution. Murphy's petition was therefore ordered to stand over until the first petition day after the then current Term.

On the following petition day, the matter of Bucke's petition was again moved, and in support of the motion were read affidavits, made by Messrs. R. Smith and Winter Jones the original trustees, and by Mrs. Bennett Little, the executrix of Lord Langford's will, and also by the petitioner Bucke, stating that each of the deponents was well acquainted with the respondent and his handwriting—that they had severally examined the said letter of the 2nd of April 1839, in the petition mentioned, and believed the same to be in the proper handwriting of the said respondent Henry Murphy; and further stating that no application had ever been made to the deponents or any of them for payment of the £500 bill of exchange mentioned in the respondent's affidavit. Affidavits were also produced from three other persons, one of whom had been a clerk in the respondent's office, stating that the deponents were well acquainted with the character of the respondent's handwriting and that having examined the said letter of the 2nd April 1839, they believed it to be genuine. On the other hand an apprentice of the respondent made an affidavit and deposed that he had been for several years last past intimately acquainted with the respondent and the peculiarities of his handwriting, and that for several reasons assigned in said affidavit, the deponent believed the said letter of the 2nd of April 1839, which he had critically examined, was not in the handwriting of the said respondent but was counterfeit.

The MASTER OF THE ROLLS called upon the respondent to produce the £500 bill of exchange in respect of which he claimed to be entitled to the £500 part of the £600 cash received by him on behalf of his client Lord Langford, on account of the fine for the lease executed by his Lordship. But the bill of exchange was not forthcoming; nor was it alleged that the respondent or any other person had ever been called on for payment of it—and it did not appear in whose hands the said bill now was, nor that it had ever been negotiated.

A number of letters written by the respondent, and admitted by him

to be genuine, were produced, by which it distinctly appeared that each of the grounds stated in the affidavit of the respondent's apprentice for his belief that the said letter of the 2nd of April 1839, was not in the handwriting of the respondent, but counterfeit, was mistaken.

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His HONOR was pleased to direct that the matter of this petition and of the respondent's petition should stand over for ten days, in order to give the said respondent the opportunity of procuring further affidavits as to the matters stated by him in his answering affidavit. Some further affidavits were accordingly procured, but they did not make any material alteration in the case.

The further consideration of the matter having been fixed for this day,

Mr. *Gilmore*, Q. C., Mr. *Smith*, Q. C., and Mr. *Major*, Q. C., for the petitioner Bucke, renewed their previous application pursuant to the prayer of the petition. On the question of jurisdiction, the case of *Ex-parte Corpus Christi College (a)* was cited.

Mr. *Warren*, Q. C., and Mr. *Blake*, Q. C., for the respondent H. Murphy, submitted that the Court had not jurisdiction to grant the prayer of the petition; that although, as between solicitor and client, the Court might interfere summarily upon petition, and compel the solicitor to refund or pay over to the client money improperly obtained or withheld by him, it would not so interfere between strangers who did not stand in the relation of solicitor and client, and between whom there was no privity whatever. If the relief now sought could be had at all, it could only be by a plenary suit to which the personal representative of Lord Langford, who was not now before the Court, should be a necessary party. As to the alleged letter of the 2nd of April 1839, upon which the case of the petitioner entirely rested, there were on the one side affidavits on belief only that this document was genuine, while on the other there was the positive affidavit of the respondent himself, who pledged his oath to the fact that this letter was not written by him nor with his knowledge, and that it was inconsistent with the agreement between him and his former client.

MASTER OF THE ROLLS.

I have considered this case and have gone carefully through the documents. There are two petitions: one, presented by Thomas George Bucke, praying that, under the circumstances set forth in his petition, the respondent, Henry Murphy, may be ordered to pay over the sum of £500, part of a sum of £600 received by him as law agent and solicitor

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(a) 6 Taunt. 105.

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of the late Lord Langford, in discharge of a certain judgment for £500 entered against Lord Langford by Murphy, and afterwards assigned by him to Mrs. Maria Smith, the present holder, who now claims the amount out of Lord Langford's estate: the other, presented by Murphy and praying for his costs incurred in the matter of Bucke's petition.—[His Honor here recapitulated the statements in Mr. Bucke's petition and in the answering affidavit of Mr. Murphy, and then continued:]—The letter of the 2nd of April 1839, if genuine, would clearly establish the petitioner's case; but the respondent positively swears that it is not in his handwriting, nor written with his knowledge or consent; and that it is contrary to the agreement which was entered into by Lord Langford and him respecting the application of the £600 paid by Rogers, and the manner in which the loan of the £500 was to be repaid. In this view of the case it is remarkable that Mr. Murphy did not in his letter of the 31st of October 1840 (a), the genuineness of which is admitted, advert to the bill of exchange for £500 mentioned in his present affidavit, nor to any other liability or unsettled transaction between him and Lord Langford, except the matter of the £500 loan for which the bond was passed.

But turning from the merits of the case, the respondent's Counsel contend that the Court has not jurisdiction to make the summary order sought by the petition—that this is not the common case of solicitor and client, in which such orders are commonly made—that there is here no privity between the parties, and consequently that a plenary suit would be necessary to give the Court jurisdiction to make an order; and it is further objected that the personal representative of Lord Langford, who should be a proper party to such suit, is not now before the Court. I do not think that for the purpose of an application, like the present, against an Officer of the Court, there is any need of a plenary suit, where the facts can be brought fully before the Court upon petition; and as to the absence of the personal representative of Lord Langford, I may observe that, although not a party to the petition, she has made an affidavit in support of it, and I have fully satisfied myself as to the jurisdiction of the Court to make the order prayed by the petition, if the case made by it shall be established in fact. The controversy between the parties is narrowed to the simple question whether the letter of the 2nd of April 1839, to which I have already adverted, be a genuine document or not. As to this, the affidavits before the Court are contradictory, and I cannot now decide, but it is my duty to put it in a due course of investigation. I might, perhaps, make an order of reference to the Master upon the subject, but I think that under the circumstances the question should

(a) *Ante*, p. 375.

most properly be determined by a jury. Therefore, my order upon the present application is,—

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ORDER :—That this motion do stand over in the list ; and that the petitioner Thomas George Bucke do commence a feigned action in her Majesty's Court of Common Pleas in Ireland against the respondent Henry Murphy, who is forthwith to appear gratis, plead the general issue, and admit all matters of form, so as that a trial may be had between the said parties by a special jury of the city of Dublin in the next Easter Term. To which end the High Sheriffs of the said city of Dublin are forthwith to lay before William Curry, Esq., one of the Masters of this Court the grand panel of the jurors of the said city, and he is thereout to name forty-eight of the said jurors ; and thereupon, each party petitioner and respondent is to be at liberty to strike out twelve, and the remaining twenty-four are to be the jury for trial of the issue following that is to say "whether the paper-writing in the petition mentioned, purporting to bear date the "2nd day of April 1839, and to be a letter written by the said "respondent Henry Murphy to the late Lord Langford is in the "handwriting of the said Henry Murphy or not ?" And it is further ordered that the said petitioner Thomas George Bucke is to be plaintiff in the said action, and the respondent Henry Murphy defendant therein, and the Judge or Judges before whom such trial shall be had are to certify to this Court the verdict of the jury on the said issue. And it is further ordered, that the said letter of the 2nd of April 1839, be lodged with Mr. William Farran the petitioner's solicitor, with liberty to the respondent Henry Murphy and any witness he desires to examine thereto to inspect the same on giving twelve hours' notice in writing to said William Farran of such his intention. And reserve further order until such trial shall be had, and on the return of the Judge's certificate such further order will be made as shall be fit.

In pursuance of the foregoing order, the issue thereby directed was afterwards tried before the Lord Chief Justice of the Common Pleas on the 5th of June 1841, and the jury found that the said paper-writing in the petition mentioned, purporting to bear date the 2nd day of April 1839, and to be a letter written by the said respondent Henry Murphy to the late Lord Langford, *was* in the handwriting of the said Henry Murphy ; which being duly certified to this Court,—

Mr. *Gilmore*, Q. C., for Thomas George Burke, moved on petition for an

June 12.

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order pursuant to the prayer of the original petition in this matter; whereupon it was ordered by the Master of the Rolls:—

That the respondent, Henry Murphy, do within one month from the date of this order, either pay to the petitioner Thomas George Bucke the sum of £500, with the sum of £62. 5s., being the interest thereon at the rate of £8 per cent. from the 17th day of May 1839, to the present time, and also the interest on the said sum of £500 from this day to the time of payment at the rate aforesaid; or, within the said period of one month cause the judgment in the petition in this matter mentioned to have been entered by him on the 6th day of June 1839, against the said Hercules Lord Langford on the bond in the petition mentioned, for the penal sum of £1000 conditioned for the payment of the principal sum of £500 and interest, to be satisfied on record, and a certificate, from the proper Officer of the Court of Exchequer in which said judgment has been entered, left with William Farran, solicitor for the petitioner, stating that such satisfaction has been entered on record; and in default of his paying the said sums or causing such satisfaction to be entered within the said period of one month, it is further ordered that the petitioner be and he is hereby at liberty to issue an attachment or such process against the person or property real or personal of the said respondent as he may be advised for the recovery of the said sums without further order. And it is further ordered that the said petitioner in case the said sums shall be paid to or levied by him, do apply the same to the payment of the sum secured by the said judgment. And it is further ordered that it be, and it is hereby referred to William Curry, Esq., the Master in this matter, to tax the costs incurred by the petitioner in this matter, including the costs of the said order, bearing date the 15th day of February 1841, the trial of the issue thereby directed and proceedings thereon, and of this application. And it is further ordered that the said respondent do pay said costs to the petitioner when taxed and ascertained, and also the costs of causing satisfaction to be entered on the roll of the said judgment, in case the respondent shall choose, according to the option hereby given to him, to pay the said sum of £500 and interest as aforesaid to the petitioner, instead of causing said judgment to be satisfied on record.

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Equity Exch.

MACLEAN v. The MARQUIS of DONEGAL.

(*Equity Exchequer.*)

Feb. 8.

MR. E. WRIGHT, for the plaintiff, applied for liberty to substitute service of the subpoena to appear and answer, on the defendants Lord Hamilton Chichester and Lord John Chichester, by serving it upon their father the Marquis of Donegal.

The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute the service of a subpoena to appear and answer, upon the agent of a party made a defendant in respect of a charge he has on the lands, the subject of the suit.

The bill was filed to foreclose a mortgage, and the defendants were made parties in respect of a charge of £70,000 created by the marriage settlement of the Marquis of Donegal for younger children; certain portions of which were vested in them. Both of the defendants were officers in the army: one was with his regiment at Malta; the other at the Mauritius. It was sworn that they were both of age; that the Marquis of Donegal frequently made remittances to the defendants, who were his sons; that he wrote letters to and received letters from, and was in constant communication with them; that he conducted and managed all their business in this country; and that out of the rents and profits of the mortgaged premises, he paid to the defendants such portions of the interest as they from time to time received on foot of their charge; and that in that respect he acted with the authority of the defendants; and that no other person acted in respect to the claim for the defendants.

The application was made under the 4 & 5 W. 4, c. 82.

RICHARDS, B.

The manifest intention of the act is to authorise the service of the subpoena to be substituted upon the agent or receiver of the owner of the estate; not upon the agent of a person having a charge upon that estate, and who receives for him the interest on his charge. Such person does not claim the lands; he is merely an encumbrancer upon it. I do not think that the case comes within the act, but will consider it.

On the next day,

RICHARDS, B., said, that upon consideration, he was of opinion that the Court had not jurisdiction to substitute the service.

No rule.

1841.
Equity Exch.

SCULLY v. SCULLY.

Feb. 8.

The plaintiff entered the rule to confirm the report, and the order that the cause be set down to be heard on report unexcepted to and merits, on the same day. The defendant afterwards excepted to the report:—*Held*, that the cause was irregularly set down.

UPON this cause being called on to be finally heard, upon a report unexcepted to and merits.

Mr. *Collins*, Q. C., for the defendant, objected that it was not properly set down for hearing. The report of the Remembrancer was signed on the 2nd of February 1841. On the same day, the plaintiff entered the usual rule to confirm the report (which would expire on the 6th instant), and also set down the cause to be heard on report unexcepted to and merits. The defendant afterwards filed exceptions to the report. *Warren v. Power* (a) and *M'Ketterick v. M'Ketterick* (b) were cited.

Mr. *Bennett*, Q. C., *contra*.

RICHARDS, B.

I shall follow the decision in *Warren v. Power*, which appears to me to be perfectly correct. The cause must be struck out of the list; and the plaintiff must pay the costs of the day.

(a) 2 Ir. Eq. Rep. 107.

(b) 2 Ir. Eq. Rep. 108, (n.)

ALEXANDER	.	.	.	<i>Petitioner.</i>
ABERNETHY	.	.	.	<i>Respondent.</i>

Feb. 11.

Where the time for shewing cause against a conditional order expires on the last of the eight days after Term, the Court will not make it absolute upon a certificate of no cause, until the first day of the next ensuing Term.

MR. SHORTT, for the petitioner, moved (at the rising of the Court) that the conditional order in this case be made absolute, on the petitioner's producing to the Officer, on the ensuing day, a certificate of no cause having been shewn. The conditional order was served at such time that the ten days allowed thereby for shewing cause against it, expired on the last of the eight days after Term. The Officer refused to give a certificate of no cause. 4 *Law Rec. O. S.* 299, was cited in support of the application.

The Registrar stated, that according to the practice of this Court, the conditional order could not be made absolute upon a certificate of no cause, until the first day of the next Term: and *per*

RICHARDS, B.

We must abide by the practice of our own Court.

No rule.

1841.
Equity Exch.

GREER v. MERCER.

COUNSEL for the plaintiff applied for liberty to withdraw the replication and amend the bill; which the Court granted. The Counsel then applied for liberty to file a supplemental bill, to bring before the Court an infant tenant in tail, born *pendente lite*.

Before issue joined, an infant tenant in tail, born *pendente lite*, may be made a party by amendment.

PENNEFATHER, B.*

As the replication has been withdrawn, the plaintiff may, according to the practice of this Court, bring the infant tenant in tail before the Court by amendment.

Liberty to amend the bill, by making the tenant in tail a party to the suit.

* *Solus.*

DORMAN v. DORMAN.

MR. BUTT, for the receiver, moved for a conditional order for an injunction, in the nature of a writ of estrepement, to restrain certain tenants of the lands over which he had been appointed, from committing waste, by quarrying in a private road, part of the premises in the pleadings mentioned. The road was common to the several tenants on the estate. He argued that the act of quarrying on the road was an interference with the possession of the receiver.

April 16.

Injunction granted upon the application of the receiver, to restrain one tenant of the estate from quarrying upon a private road, part of the premises, and which was common to all the tenants.

The COURT at first doubted whether the act complained of was not a mere trespass; but finally granted the application.

1841.
Equity Exch.

TRISTRAM, *Petitioner* ;
HARTE, . *Respondent*.

April 24.

The respondent, in the affidavit made by him to shew cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment was a certain specified sum exceeding the amount of the principal sum mentioned in the bond, and six years' interest thereon; and did not rely on the 3 & 4 W. 4, c. 27, s. 42, as a bar: *Held*, that a report finding that the principal money, with six years' interest thereon only was due on foot of the judgment, was erroneous, it being contrary to the admission in the affidavit.

THE petition in this case was presented under the 4 & 5 W. 4, c. 55, for a receiver upon a judgment on a bond, in the penal sum of £553. 19s.

The affidavit verifying the petition stated that the sum of £594. 10s. 11d. was justly due to the petitioner on foot of the judgment, for principal, interest and costs, over and above all just and fair allowances.

The respondent (the conusor of the judgment) made an affidavit to shew cause against making the conditional order absolute; whereby he stated as follows:—"Saith that he positively denies that the sum of £594. 10s. 11d. remains justly due to the petitioner after all just and fair allowances; but saith that the entire sum due by the deponent on foot of said judgment is £474. 8s., besides costs, which this deponent is advised he is not liable to." The affidavit did not rely upon the 3 & 4 W. 4, c. 27, s. 42, or refer to it: but in a concluding paragraph of it, the respondent submitted, that for certain reasons stated in it, the receiver should only be appointed over a certain portion of the lands mentioned in the petition.

The conditional order was made absolute on the 3rd of February 1837; and on the 8th of May 1839 the usual order of reference was made, to inquire and report how much was due on foot of the judgment. The Remembrancer reported that the principal money and interest thereon from the period of six years antecedent to the date of the conditional order only, was due on foot of the judgment. That sum was much less than the sum stated by the respondent, in his affidavit, to be due thereon.

Mr. *W. Bourke*, for the petitioner, now moved that the report of the Remembrancer be sent back to be reviewed.

The question whether more than six years' interest upon the principal sum secured by a judgment is recoverable thereon, since the 3 & 4 W. 4, c. 27, s. 42, does not arise in this case: for even though judgments be within the operation of that section, the admission of the respondent in his affidavit is an acknowledgment in writing within the meaning of the act, and takes this case out of the general operation of the section. There is no decision to that effect to be found; but cases upon bills for the specific execution of a contract for the sale of lands, not reduced into writing, afford a strong analogy. If in such a case, the defendant by his answer admit the contract, the Court will decree it to be specifically

performed, although it be not reduced into writing, unless the defendant by his answer relies upon the Statute of Frauds; *Croyston v. Banes* (a); *Cooth v. Jackson* (b); *Rowe v. Teed* (c); and *Blagden v. Bradbear* (d): and the old cases went this length, that if the defendant admitted the contract, but stated that it was not in writing and relied upon the Statute of Frauds, nevertheless a specific performance would be decreed; *Cottingham v. Fletcher* (e); *Child v. Godolphin* (f). So here, the respondent admits a certain sum to be due on foot of the judgment, and does not rely on the statute as a bar to the petitioner recovering more than six years' interest on the principal sum.

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[BRADY, C. B.—The Court is strongly of opinion that after making that affidavit, stating that that sum only is due, and after submitting to the Court that a certain part of the property only should be applied in payment of the sum he so admits to be due, the respondent cannot be allowed, independent of any question on the act of Parliament, to insist in the office, that a lesser sum is due than that which he has so admitted. The allegation in the affidavit, 'which this deponent is advised he is not liable to,' clearly refers to the costs and not to the sum of £474. 8s.]

Mr. Napier, for the respondent.—If the case be within the statute, the Court cannot prevent the defendant relying upon it. The 3 & 4 W. 4, c. 27, s. 42, differs from the former statutes of limitation in that it proceeds upon the assumption that the debt is due; not that it has been discharged. Therefore an admission that so much is due, does not prevent the respondent relying on the statute as a defence. The language of the 42nd section is prohibitory;—that no arrears of interest shall be recovered but within six years after the same shall become due;—and, therefore, the defence given by it is wholly independent of the state of the account between the parties. Again, this admission cannot be considered as an acknowledgment within the meaning of the act; it is not given to the person entitled to the interest; *Hill, assignee of D'Courcy v. Stawell* (g). As to the objection that the respondent is precluded from relying upon this defence by reason of his affidavit, *Morris v. Whyte* (h) shews that a party may rely on a different case from that set forth in his affidavit.

BRADY, C. B.

I cannot distinguish this from the case of a bill filed, and an answer

(a) Pre. Ch. 208.

(b) 6 Ves. 12, 37.

(c) 15 Ves. 372, 375.

(d) 12 Ves. 471.

(e) 2 Atk. 155.

(f) 1 Dick. 39.

(g) 2 Ir. Law Rep. 302; S. C. 12 J. & S. 389. (h) 1 Tyr. & G. 110.

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put in to it: and with respect to the conclusiveness of an admission in an answer, a strong instance is to be found in the case of *The East India Company v. Keighley* (a), where the defendant having by his answer admitted a profit of £20,000 on certain contracts, and the decree declaring him answerable for the same, as trustee for the plaintiffs, the Master on taking the accounts between the parties reported that the defendant, instead of being indebted to the plaintiff to the amount of £20,000, was a creditor on the plaintiffs to the amount of £67,000: but it was held that the Master was not authorised to make such a report, no evidence being admissible to contradict the answer. Upon the general principles of equity, an answer put in by a party is conclusive on him, as to every admission contained in it; and, therefore, without deciding the question upon the Statute of Limitations, or whether the affidavit be an acknowledgment within the meaning of the 42nd section of that act, I am of opinion that upon this record, the statement in the affidavit cannot be controverted; and that if necessary, we are at liberty to presume that a sufficient acknowledgment in writing has been given by the respondent.

PENNEFATHER, B.

In this case the petitioner by his petition says, that the sum of £594. 10s. 11d. is due to him on foot of the judgment. The respondent replies No—there is only £474. 8s. due on the judgment; and he makes that admission in such a manner as shews that it is not merely an admission that so much money is due, according to calculation, for principal and interest on the judgment; but that so much money is due and payable by him for principal and interest on the judgment. He admits that; but insists that he is not liable to certain costs: and submits that the money due ought to be paid out of a certain portion of the estate only. Upon that affidavit, there was no controversy between the parties as to whether the sum of £474. 8s. was due or not: and upon making the conditional order for the receiver absolute, the Court might have directed the receiver to pay that sum to the petitioner out of the first monies he received. No other objection could be made to such an order than the possibility of other creditors extending the receiver to the matter of their petitions. But had such an order been made, and had the respondent obtained the benefit he sought, by having the receiver confined to a certain portion of the lands, could he afterwards be heard to say that that sum was not due and payable on foot of the judgment? The affidavit is conclusive on the Court, and ought to be so upon its Officer. It is referred to him to inquire and report how much is due on foot of the judgment. The petitioner might have insisted that more than £474. 8s. was due to him, but the respondent could not say that less than that sum

(a) 4 Mad. 16.

was due, for that sum was not in controversy between the parties. The only matter in dispute was, whether any thing *ultra* that sum was due on foot of the judgment.

FOSTER, B., concurred.

RICHARDS, B.

I agree with the other members of the Court. I do not rest my opinion upon the construction of the 3 & 4 W. 4, c. 27, s. 42; but on this, that the respondent has by his admission in this particular suit, precluded himself from insisting that any lesser sum than the sum of £474. 8s. is due and to be paid over to the petitioner. For the purposes of this suit, he has admitted that sum to be due; and he calls on the Court, by his affidavit, to act upon that admission. Upon the principles which equally govern the proceedings of Courts of Law and Equity, and upon the precise authority cited by the Chief Baron, the respondent is concluded by his admission in the suit; and cannot deny that £474. 8s. at least, is due and to be paid over to the petitioner. It was open to him, if by a slip he had made such an admission, to have applied to the Court for liberty to file a further affidavit. How the Court would have dealt with such an application is another question; but so long as that admission remains unexplained upon his affidavit, so long must he be concluded by it in this suit. I concede that there should be a clear and unequivocal admission to bind the party; and therefore I have looked at the affidavit to see whether the admission in this case was such;—whether it was merely an admission that so much was due upon a computation of principal and interest, or that the sum specified was the sum which the respondent intended to admit to be the sum justly due and payable by him;—and my opinion is that this is the sum which he considered to be justly due and payable by him to the petitioner. That being admitted by the respondent, the Court has nothing to do but to act upon that admission.

It appearing that payments had been made on foot of the judgment, it was consented by the parties that the sum of £474. 8s. should be inserted in the report, instead of the sum found thereby to be due on foot of the judgment for principal and interest.

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June 29.

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O'KELLY v. BODKIN.

Where a judgment has been obtained upon a bond in a penalty conditioned for the payment of a principal sum with interest, the principal sum is "a sum of money charged upon or payable out of land or rent" within the meaning of the 3 & 4 W. 4, c. 27, s. 42: and that statute bars the recovery of all arrears of interest thereon, which have accrued due more than six years next before the commencement of a suit instituted after the 31st of December 1833, to enforce payment thereof out of land, or rent; the case not being within any of the exceptions mentioned in the 42nd section.

Semble :— That the statute is a similar bar to the recovery of interest thereon by a proceeding against the person or personal chattels of the debtor.

A creditor who does not come in regularly to prove his demand under the decree to account in a creditors' suit, but obtains an order for liberty to file a charge and obtain a separate report at his own expense, upon an affidavit stating that he was ignorant of the existence of the suit until after the decree to account was pronounced and the report thereunder made, cannot rely on the suit as being his from the beginning, so as thereby to avoid the bar of the 3 & 4 W. 4, c. 27, s. 42.

AFTER the final decree in this cause had been pronounced, T. Browne, the receiver in the cause of *Murray and others v. D'Arcy and others* (which suit had been instituted to administer the assets of W. Burke deceased), and who had been appointed to collect the outstanding debts due to the personal estate of W. Burke, applied to this Court that, as such receiver, he might be at liberty to come in before the Remembrancer under the decree to account pronounced in this cause on the 23d of June 1835, and prove the amount due on foot of the judgment obtained as of Easter Term 1808 by W. Burke against John Bodkin: which application was founded upon an affidavit by T. Browne, in which he stated that up to the month of November 1839, he had not heard of and was wholly ignorant of the institution of this suit, and of the proceedings in it. Whereupon it was ordered by the Court that he be at liberty to come in before the Remembrancer and prove the amount due on foot of said judgment and obtain a separate report thereunder; he undertaking to take such reference and procure such report at his own expense, as such receiver; without prejudice to any question as to the claim for the amount of interest on said judgment, having regard to the late Statute of Limitations or otherwise.

The Remembrancer by his report of the 4th of June 1840, found that W. Burke in Easter Term 1808, obtained a judgment in the Common Pleas against John Bodkin, the father of the defendant, for the sum of £3600, besides costs; under and by virtue of the bond and warrant of J. Bodkin, dated the 6th of March 1808 for the sum of £3600, conditioned for the payment of £1800 with legal interest thereon:—that in Easter Term 1826 the judgment was duly revived by W. Burke;—and was re-docketted on the 24th of June 1833.

That several payments were made to W. Burke in his lifetime, in part discharge of the sum due on foot of the judgment for principal, interest and costs; amounting in the whole to £548. 12s. 5d.: and that there

was then due on foot of the judgment, for principal and interest (the interest exceeding the principal), the amount of the penalty, being £3323. 1s. 9d., after giving credit for the sum of £548. 12s. 5d.: and for costs, the sum of £42. 8s. 3d. But that it was insisted on the part of the defendant, that inasmuch as no claim was made to prove said judgment in this cause, until after the pronouncing of the final decree, no interest on the principal sum secured thereby should be allowed or reported as a charge upon the lands in the pleadings mentioned, save so much as accrued due during the six years before the 12th day of March 1840, being the date of the filing of the charge on foot of said judgment; which question, being matter of difficulty, the Remembrancer referred to the decision of the Court.

The original bill was filed on the 28th of October 1832, against John Dominick Bodkin, W. Burke and others; but W. Burke never appeared in the cause or was served with a subpoena, and his name was afterwards struck out of the bill.

By the report under the decree to account in this cause, the Remembrancer reported that he did not find that J. Bodkin died possessed of any personal estate, no evidence thereof having been laid before him.

Mr. *Blake*, Q. C., for the judgment creditor, now moved that the special point in the report be ruled in his favour. Upon the argument of the exceptions in this case,* the Court held that a creditor coming in at the proper time, and proving his demand under the decree in this cause, was not affected by the provisions of the 3 & 4 W. 4, c. 27, inasmuch as the suit was instituted prior to the passing of that act. The first question in the present case is whether a creditor who has proved his demand under this decree, not in the regular course of the proceedings, but pursuant to the leave of the Court for that purpose given, is not in the same situation. *Berrington v. Evans* (a) does not decide that question. There the Court refused to permit the judgment creditor to prove his demand under the decree; here he has been permitted to do so, and has obtained a report finding that the full amount of the penalty of the judgment still remains due and unpaid to him. In *Berrington v. Evans*, the Court did not determine what would be the effect of the creditor proving his demand under the decree.—[PENNEFATHER, B.† They did so in substance. The question there was, whether the whole demand of the creditor was barred or not. The only thing relied on to take the case out of the operation of the statute was the pendency of the suit; but the Court determined that inasmuch as the creditor stated that he was not aware of the institution of the suit until after the final decree was pronounced,

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(a) 1 Y. & C. 434.

* 2 Ir. Eq. Rep. 361.

† *Solus*.

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he could not in any wise consider that suit as his own : and being of that opinion the Court properly refused to allow him to go before the Officer and prove his demand.]—That case goes much further ; for the Court said that since the passing of the 3 & 4 W. 4, c. 27, the pendency of a suit did not take the case out of the operation of that statute. In the opinion of Lord Abinger, *Sterndale v. Hankinson* (a) is no longer to be considered as law.

[PENNEFATHER, B. Such an opinion may have been thrown out by the Chief Baron, but it was not necessary for the decision of the case, and I do not think that it was fully considered. In so far as *Berrington v. Evans* overrules *Sterndale v. Hankinson*, I have no hesitation in saying that it is wrong : for I have the judgment of this Court upon the ruling of the exceptions in this case, determining that *Sterndale v. Hankinson* is law notwithstanding the 3 & 4 W. 4, c. 27. The question as to the amount of interest recoverable on this judgment is a difficult one ; therefore let the case stand for argument before the full Court.]

1840.
 Nov. 14.

The case now came on to be argued, before the full Court.

Mr. *Corballis* for the judgment creditor, argued that the Court having permitted the creditor to go before the Officer and prove his demand under the decree in this cause, they thereby decided that the suit was one which the creditor had a right to consider as having been instituted from the beginning, for his benefit ; and therefore that the case was within the principle of *Sterndale v. Hankinson* (b).—[PENNEFATHER, B. The Court only decided that there being a fund in Court, the creditor had a right to come in to ascertain whether there was any thing due to him, properly payable out of that fund. But we by no means decided how much was payable to the creditor.]—Then the judgment creditor claims the full amount of the judgment upon two grounds : first, that a judgment is not a charge upon land, and, therefore, not within the operation of the act ; and secondly, that if it be a charge upon land, it is a charge for the full amount of it ; and upon that sum the creditor does not claim interest. *Kealy v. Bodkin* (c) is an authority for both positions.

Mr. *Monahan*, Q. C., for the defendant J. D. Bodkin, the inheritor, opposed the motion, and also moved that the special point be ruled in his favour.

The simple question in this case is, whether a judgment upon a bond in a penal sum for securing the payment of a principal sum with interest, is or

(a) 1 Sim. 393.

(c) 1 Sau. & So. 211.

(b) 1 Sim. 393.

is not within the operation of the 3 & 4 *W.* 4, c. 27, s. 42. The present Master of the Rolls has, in *Kealy v. Bodkin*, decided that it is not; but, notwithstanding that decision, we contend that it is. The previous sections of that act are conversant about land and rent; the 40th section is the first in which charges upon land or rent are mentioned. It is plain, from that section, that whether a judgment be in its nature a charge upon land or not, the Legislature treats it as such for the purposes of the act. The words, "secured by judgment or otherwise charged upon or payable out of land," are conclusive of their meaning. Then construing the 42nd section by the 40th, it is manifest that the general phrase, "any sum of money charged upon or payable out of any land," in the 42nd section, includes within it the particular case of "any sum of money secured by judgment;" and the 42nd section may be read in the present case as if those latter words were substituted for the former. The enactment would then run thus:—"No arrears of interest in respect of any sum of money secured by judgment shall be recovered but within six years after the same shall have become due;" and the question is, what is the sum of money secured by the judgment? The act does not legislate with respect to interest on the security, but on the sum secured thereby. What is that sum? It is the principal sum mentioned in the bond upon which the judgment has been obtained. The penalty of the bond is but a security for the re-payment of that principal sum, with interest thereon; and the judgment follows the nature of the obligation. The universal practice of the Courts, and the understanding of mankind, is to consider the judgment as a security for the principal sum. Prior to the 3 & 4 *Vic.* c. 105, interest was not payable upon the sum for which a judgment had been recovered without a contract for that purpose. That act does not relate to judgments upon bonds in penal sums with warrants of attorney; but it shews that if, as is contended, the sum secured by the judgment be the sum for which it has been obtained, subject to be reduced to the amount of the principal sum and the interest then due, a payment of interest must be a payment of part of the sum for which the judgment has been recovered, and, therefore, that no more than the amount of the judgment, as reduced by such payment, could be thenceforward recovered on foot of it; which is contrary to every day's practice. As to the difficulties suggested by the Master of the Rolls,—that this inconsistency would arise from the construction of the act now submitted to the Court, viz., that the creditor may recover twenty years' arrears of interest by proceeding on his judgment against the chattels personal or the person of the debtor—although he can only recover six years' arrears of interest out of land, the same inconsistency will arise in the case of a mortgage, which is expressly within the operation of the 42nd section. The only construction by which these inconsistencies may be avoided is, by holding that the 42nd section applies to

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all actions and suits brought to recover interest upon any sum of money which is or may be charged upon or payable out of land; whether by such action or suit it is sought to raise that interest out of the real or personal estate of the debtor. This construction is fortified by the case of *Hodgens v. Kelly*, in the Queen's Bench, which is not in print. It was a *scire facias* upon a judgment more than twenty years old, against the conusor of the judgment. The defendant pleaded the 3 & 4 W. 4, c. 27, s. 40. The plaintiff replied, that within twenty years before the issuing of the *scire facias*, he had caused another writ of *scire facias* to be issued against the conusor upon the same judgment, and that certain proceedings, but not to judgment, were had upon that writ. The defendant demurred. It was argued for the plaintiff, that as the issuing of the former writ of *scire facias* was sufficient to save the bar of the 8 G. 1, c. 4, and as the Court might award execution against the person or chattels personal of the conusor, the 3 & 4 W. 4, c. 27, s. 40, was no bar to the action: but the Court held that it was, and gave judgment for the defendant.—[BRADY, C. B. The 42nd section does not say that no interest shall be recovered *out of land*; but, generally, that *no interest shall be recovered* but within six years after the same shall have become due.]—So in *Phillipo v. Munnings* (a), it seems to have been admitted, that a legacy payable out of personal estate was within the 40th section. *Bruen v. Nolan*, in which this Court held that in an action of covenant by a lessor against his lessee, no more than six years' arrears of rent could be recovered; and *Foley v. Dumas* (b), in which the Court of Common Pleas held that no more than six years' arrears of an annuity charged upon land, and collaterally secured by a judgment against the defendant, could be recovered on foot of that judgment, are authorities in support of this view of the case. It is, however, unnecessary to decide that question at present; for the entire fund in Court is the produce of the real estate of the conusor, and the Remembrancer does not find that he died possessed of any personal estate.

Mr. *Blaks*, in reply.

1. The 42nd section does not apply to judgments. They are not charges on land. *Kealy v. Bodkin* (c), *Barnewall v. Barnewall* (d). But supposing that they are charges on land within the meaning of that section, the question arises, what is the sum of money thereby charged on or payable out of the land, and does it bear interest? The charge is the full sum for which the judgment has been recovered; not the amount of the principal and interest which may at any particular time be due. In this respect it differs from a mortgage, which is a charge for

(a) 2 M. & C. 309.

(b) 1 Smy. 78.

(c) San. & Sc. 211.

(d) 3 Ridg. P. C. 35.

the principal sum, and for the interest, as it from time to time accrues due. In the case of a judgment, the Court does not act by giving relief in the way of interest to the creditor, but by cutting down his strict legal right, to the amount of the principal and interest which may be due. The construction proposed to be adopted, that the statute applies to proceedings to enforce payment of the interest out of chattels personal, is not sustainable. *Phillipo v. Munnings* was not a suit to recover a personal legacy, but to enforce a personal demand against a trustee. Nor would such a construction relieve the question from its embarrassments; for suppose the case of a bond in a penal sum, the obligee might recover upon it principal and interest to the amount of the penalty; whereas if he had obtained judgment upon it, he could only recover six years' arrears of interest on the principal money. The argument *ab inconvenienti* cannot prevail against the clear intention of the Legislature, which was to put a limit to suits affecting real property, but to leave such as affected personal chattels as they were. The whole act is conversant about real property. Assuming that the act does not apply to cases where the demand is sought to be enforced against the person or chattels personal of the debtor, this absurdity would follow from the construction contended for: that if a judgment creditor obtained a receiver over the real estate of his debtor for payment of the debt, pursuant to the 5 & 6 W. 4, c. 55, the Court would be bound, by the 31st section of that act, to cause the judgment to be satisfied upon the roll, on the principal sum and six years' interest thereon being paid to the creditor, although the latter might be entitled to have execution against the person of the debtor for a much larger arrear of interest. Again, by the 3 & 4 Vic. c. 105, s. 22, judgments are made charges upon land; and by the 26th section of the same act, every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest, shall carry interest at the rate of £4 per cent. per annum, from the time of entering up the judgment *until the same shall be satisfied*. This section, although not applicable to the present case, clearly repeals the 42nd section of the 3 & 4 W. 4, c. 27, so far as it might be considered to relate to such judgments; and with respect to them, interest to an unlimited amount may be recovered. No reason can be assigned why such judgments should be more favoured than those obtained upon a bond for securing a principal sum and interest thereon to a limited amount; and the Court will be slow to make such a distinction.

2. This case falls within the principle of *Sterndale v. Hankinson* (a); and is clearly distinguishable from that of *Berrington v. Evans* (b). Here the creditor came in before the fund in Court was distributed. In fact the notice of his application was served before the final decree was

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(a) 1 Sim. 393.

(b) 1 Y. & C. 434.

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actually pronounced. But in *Berrington v. Evans* the application was made five years after the fund had been allocated. The question is, whether the Court can consider this as the suit of the creditor from the beginning; but that question is not to be determined by the affidavit of the party as to his knowledge of the existence of the suit, or of his intentions with regard to it, but by the fact whether he took advantage of it while it was yet pending in Court. Here the Court has made an order permitting the creditor to prove his demand under the decree; and has thereby made this to be his suit, which it before was not.—[PENNEFATHER, B. Not so;—but in order that the estate might be saved the expense of another suit, the Court permitted the creditor to prove his demand under the decree in this cause. In *Berrington v. Evans*, the creditor was wholly barred by the statute unless he could shew that the suit was his suit: but here the creditor's demand was not barred *in toto*, whether the suit was considered his or not; and if his application had been refused, he might, next day, have filed a bill to raise the sum due on foot of his judgment. Therefore, the order on this creditor's application does not establish that the suit must be considered as his from the beginning. Then when the applicant swears that he never knew any thing about the suit, how can we intend in his favour that he regarded it as his own from the beginning? And we must do that in order to give him the benefit of it; for the ground upon which a suit is considered to be the suit of a creditor proving under the decree in it, is, that he lay by and forbore to institute a suit himself, knowing the pendency of the other suit.]

Mr. Monahan cited *Lord St. John v. Boughton* (a), where the Vice-Chancellor said that the 3 & 4 W. 4, c. 27, s. 40, applied to every debt attempted to be proved after the 31st of December 1833.

Nov. 20.

It was afterwards, Friday November 20th, suggested that Mr. Burke, the conusee of the judgment, had been, originally, made a party to this suit as an *elegit* creditor in possession, under this judgment; and that, therefore, Browne, as representing him, was entitled to consider the suit as pending for his benefit from the beginning. The Court directed the facts to be inquired into, and the matter to be mentioned again.

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 Feb. 16.

It then appeared that Burke's judgment was obtained in Easter Term 1808: that he afterwards sued out an *elegit* and got into possession of part of the lands in the pleadings mentioned. The last receipt of rent which it appeared he had received was in August 1831. The bill in this case was filed in October 1832. It stated that Burke claimed some interest

(a) 9 Sim. 219, 223.

in the premises (not that he was an *elegit* creditor in possession), and prayed an account of prior encumbrances and what was due thereon, but no specific relief against him. It also prayed process against him; but it did not appear that any subpoena had ever been issued against him; and it was admitted that he never had been served with such, and never had appeared to the bill. It did not appear when he gave up possession of the lands extended under his *elegit*. On the 10th of May 1834, Burke died; in the same year a receiver was appointed in the cause; and in 1835 Burke's name was struck out of the bill. The decree to account was pronounced in June 1835.

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Mr. Monahan cited *Asbee v. Shipley* (a).

Mr. Blake, Q. C., *contra*.

BRADY, C. B.

The Court are of opinion that the facts stated do not distinguish this case from that of *Berrington v. Evans*,—and that the general question upon the construction of the statute arises, and must be decided: but we desire to have that question re-argued by one Counsel on each side

The case came on to be re-argued before the full Court.

April 24.

Mr. Blake, Q. C., for the judgment creditor.—The principal arguments to shew that a judgment is not a charge upon land, are to be found in the judgment of the Master of the Rolls in *Kealy v. Bodkin* (b). In addition to what is there said, it may be observed that the 3 & 4 Vic. c. 105, s. 22, would be wholly useless if judgments were previously charges upon land. The judgment, *per se*, is not a charge upon the land; it is the issuing the *elegit* which creates the charge; *Neate v. The Duke of Marlborough* (c). That was a bill by a judgment creditor against the conusor, for payment of the sum due on foot of the judgment out of an equitable interest which the conusor had in certain freehold lands. Lord Cottenham held that the bill was demurrable, because it did not allege that the plaintiff had sued out an *elegit*; and then, after stating that the Court for certain purposes recognised a title by judgment, he says (d), “That it is not correct to say that according to the usual acceptance of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right.” The converse of that is true; if he cannot sell, he has no lien.—[PENNEFATHER, B. No: for even if the creditor had sued out an *elegit* he would not have a right to sell

(a) 6 Madd. 296.

(b) 1 San. & Sc. 211.

(c) 3 M. & C. 407.

(d) p. 417.

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the estate. I fully assent to the decision in that case; but I rather think that Lord Cottenham has unnecessarily used the word 'lien' in delivering his judgment. Courts of Equity follow the law during the lifetime of the conusor, and will not sell the lands for payment of the judgment creditor: after his decease they will sell the lands for the purpose of administering the assets of the deceased. But in the former case it is the statute which gives the creditor his title to come into Equity; and to give him relief it is not necessary to determine that he has acquired a lien upon the land.—BRADY, C. B. The question really is not whether a judgment, strictly speaking, is a charge upon land; but whether it is so within the meaning and intention of the 42nd section of this act.]—Not merely that, but whether it is a charge *bearing interest*. Unless it be so it is not within the 42nd section, although it be within the 40th. Now the sum for which the judgment has been recovered is the sum charged on the land, and that sum does not bear interest. That is the sum claimable by the conusee of the judgment; but Courts of Equity and Courts of Law acting upon equitable principles, cut down that sum to the amount of the principal sum with interest thereon.

Mr. Monahan, Q. C., for J. D. Bodkin, the inheritor.—The exception in the 40th section, with respect to the payment of interest, shews that the Legislature considered that the principal sum was the sum secured by the judgment, and was a sum bearing interest; and the language of the 3 & 4 Vic. c. 105, s. 26, leads to the same conclusion. *Sheppard v. Duke* (a) and *O'Hara v. Cragh* (b) shew that the act applies to demands which are sought to be levied out of personal estate only.

June 23.

BRADY, C. B.

In this cause, which is a suit on behalf of a judgment creditor of John Bodkin, deceased, for payment of his demand out of the real and personal estates of the debtor, a decree was pronounced on the 23rd of June 1835, directing the Officer, in the usual manner, to take an account of the sum due to the plaintiff, and of the real and freehold estates of John Bodkin, and all charges and encumbrances affecting those estates. Under this decree, a report was made, dated the 1st of November 1838, to which exceptions were taken by several creditors as to the amount of the sums which ought to have been found due to them. Those exceptions were argued in Hilary Term 1840; and on the 15th of February in that year, the Court gave judgment in favour of the creditors, allowing the exceptions, and the report was ordered to be corrected accordingly. After judgment was given on those exceptions, an order was made on the motion of Thomas Browne, who claimed to be a

(a) 9 Sim. 567.

(b) *Ante*, p. 179.

judgment creditor of J. Bodkin, giving him leave in that stage of the cause, to go into the office and prove his demand; and that order was very specially directed to be "without prejudice to any question of interest, having regard to the late Statute of Limitations." Under this order the Officer has made his report bearing date the 4th day of June 1840; and by it he finds that there was then due on foot of the judgment for principal and interest (the interest exceeding the principal), the amount of the penalty: and he then proceeds thus;—"but I find that it was insisted before me on the part of the defendant, that inasmuch as no claim was made to prove the said judgment in this cause, until after the pronouncing of the final decree, no interest on the principal sum secured thereby should be allowed or reported as a charge upon the lands in the pleadings mentioned, save so much as accrued due during the six years before the 12th day of March 1840, being the date of the filing of the charge on foot of said judgment:" which question being matter of difficulty, the Officer has referred to our decision. The Remembrancer then reports the sum due on foot of the judgment, in each view of the case so submitted to the Court.

Upon these proceedings then, the question raised is whether more than six years' interest can be recovered on the principal sum secured by this judgment, having regard to the 3 & 4 W. 4, c. 27. An attempt was made in the course of the argument to shew that, without deciding that general question, this case might be determined upon the principle established by the case of *Sternale v. Hankinson* (a), and acted on by this Court in favour of other creditors on the argument of the exceptions in this cause, in January 1840 (reported in 2 *Ir. Eq. R.* 361); viz. that Thomas Brown was a creditor coming in under the decree in the cause, and was, as such, entitled to consider it as his suit from the beginning; and consequently as the bill was filed before the statute was passed, that his demand was not affected by its provisions. But on looking to the affidavit on which the order of the 10th of February was obtained, we find it sworn by Thomas Brown "that he had never heard of the cause until the month of November last"—i. e. 1839; and in this respect, the case is not distinguishable from that of *Berrington v. Evans* (b), in which it was held that a creditor thus stating his ignorance of the suit, could not be entitled, in regard to the Statute of Limitations, to the benefit of the proceedings. To meet this difficulty, it was stated that the applicant Brown was a mere formal person, a receiver appointed by the Court of Chancery in a suit respecting the property of the original conusee of the judgment, Burke; and that Burke had in fact been in his lifetime a party to the suit. On further investigation of the case as to these matters, it appeared however, that though named in the original bill,

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(b) 1 Y. & C. 436.

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Burke had never appeared or been served with process in the cause; and that his name had been struck out of the bill on the 29th of January 1835. There is nothing therefore to shew that the Court could look to the acts of any one as interested in the judgment, in respect to this question, except the applicant John Brown; and upon his affidavit, for the reasons I have stated, the case falls exactly within the authority of *Berrington v. Evans*; and consequently the question raised in the present motion must be decided as if this were now the first proceeding instituted on the judgment.

That question is, whether in any action or suit upon a judgment confessed on a bond in a penal sum conditioned to secure a principal sum of money with interest, the conusor of the judgment can now recover more than six years' arrears of such interest:—in other words,—whether the principal sum so secured is “a sum of money charged on or payable out of land,” within the true intent and meaning of the 42nd section of the recent Statute of Limitations, the 3 & 4 *W.* 4, c. 27; and is the sum intended to be affected by that section. When we consider the extensive prevalence of this species of security, for a long period of years, in Ireland;—the multiplicity of cases which must be more or less affected by the decision;—and the number of such cases actually pending in this Court, in various forms of proceeding;—it is impossible to rate too highly the importance of this question. The Court has therefore deliberated long before pronouncing judgment upon it; and for myself I must unfeignedly say, that my feeling of the necessity of using the utmost caution and the most mature deliberation in forming a judicial opinion on the question has been in no small degree increased by finding that the first impressions I had formed on reading the statute and the conclusion I have ultimately arrived at, are opposed to the solemn and deliberate judgment pronounced on this very question, in a case expressly calling for its decision, by a Judge for whose ability and soundness of opinion I entertain the highest respect. I allude to the judgment of the present Master of the Rolls in the case of *Kealy v. Bodkin*, much relied on in the argument before us, and which is reported in 1 *Sausse and S.* 218. But called on as we are, imperatively, on the present motion, to pronounce our own opinions on the construction of this statute, it is our duty to do so according to the best of our ability, however we may regret that in so doing we conflict with that of another tribunal, co-ordinate in reference to the subject matter:—leaving it to the revision of the appellate jurisdiction common to both, to correct our error, if error we shall commit, in giving judgment according to those opinions.

The question, as I have said, arises on the 42nd section of the statute, 3 & 4 *W.* 4, c. 27, which is in the following words;—“that after the 31st day of December 1833, no arrears of rent or of interest in respect of “any sum of money charged upon or payable out of any land or rent, or

"in respect of any legacy, shall be recovered by any distress, action or suit
 "but within six years next after the same respectively shall have become
 "due, or next after an acknowledgment of the same in writing shall have
 "been given to the person entitled thereto, or his agent, signed by the
 "person by whom the same was payable or his agent;" and then follows
 a proviso which I shall have occasion to advert to presently:—and that
 question is, whether a sum of money secured by a judgment confessed as
 I have above stated, is a sum charged upon or payable out of land within
 the operation of this section. This is obviously a question of construc-
 tion, as to the meaning of those terms; because the words "judgment"
 or "sum secured by judgment" do not occur in the entire section. And
 being thus a question of construction, I think it is the fittest course, in
 considering it, to look in the first place to those settled rules or canons
 of interpretation which have been adopted in our law as the surest
 guides to the right understanding of the acts of the Legislature:—and
 I may say of those rules, that when examined and rightly considered, they
 will be found in general to be, not mere arbitrary and conventional regu-
 lations, depending on purely technical distinctions; but on the contrary,
 the well considered deductions of sound reason and common sense, com-
 manding our assent from their intrinsic propriety and justice. Such is
 that which I shall first advert to in dealing with the present case. I find
 it thus laid down in *Co. Litt.* 381 a, and adopted in *Bac. Abr. tit. Statute*
I. 2. "The most natural and genuine way of construing a statute, is to
 "construe one part by another part of the same statute; for this best ex-
 "presseth the meaning of the makers:—such a construction is *ex viscer-*
"ibus actus." The same rule is expressed in other words in *Plowden's*
Commentaries, 365. "If any part of a statute be obscure, it is proper
 "to consider the other parts; for the words and meaning of one part of
 "a statute frequently lead to the sense of another." Now the words we
 have to deal with in the present case are these,—"any sum of money
 "charged upon or payable out of any land;" and according to the rule
 of construction I have stated, let us see whether there are any other
 parts of the same statute which will lead us to the sense in which these
 words are used in the section I have read. In this particular we are not
 left without assistance; for in the 40th section of the act, the identical
 phrase occurs,—"*sum of money charged upon or payable out of any land:*"
 and from the context of that section, no doubt can exist as to the sense in
 which it is there used, in reference to the subject matter of the present case.
 That section is as follows:—"That after the 31st day of December 1833,
 "no action or suit or other proceeding shall be brought to recover any
 "sum of money, secured by any mortgage, judgment or lien, or otherwise
 "charged upon or payable out of any land or rent, at Law or in Equity,
 "or any legacy, but within twenty years next after a present right to re-
 "ceive the same shall have accrued to some person capable of giving a

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"discharge for release of the same;" unless in certain excepted cases. It has not been contended in argument that a sum of money secured by judgment does not fall directly within the legislation of the 40th section; and I cannot conceive language more express and unequivocal to denote that the Legislature, in this section at least, considered a sum so secured as being a sum charged upon or payable out of land, than the language thus used—"secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land." I cannot read these words in any other sense; and I believe it never has been contended that in this section at least, the Legislature did not so use or understand them. Now when we find this identical form of expression used in two sections of the same act of Parliament;—two sections so nearly connected as well in point of location in the act as in the subject matter of their provisions, I think, in accordance with the rule of interpretation I have stated, we are fully entitled to call the one section in aid of any doubt or uncertainty that may exist in the other; and having it, therefore I may say, declared by the 40th section almost in express terms, that a sum of money secured by judgment is a sum charged upon or payable out of land within the meaning of the Legislature, we may fairly consider the same words when used in the 42nd section, as having a meaning as comprehensive as that recognised to belong to them in the 40th section; and consequently to comprise a sum secured by judgment so far at least as that section may properly apply to a sum so secured.

It has however been contended, and some cases or dicta have been cited to support the proposition, that a sum secured by judgment is not to be considered as a sum charged upon land within the meaning of this section, because it is not, as it is said, primarily so charged: and such appears to be the opinion of the Master of the Rolls in his judgment in *Kealy v. Bodkin* which I have already referred to. No doubt, in the earliest periods of our law, a judgment could not be made permanently available against the freehold lands of the debtor, although the creditor might by a writ of *levavi* have execution of the corn and other present profits growing upon the land. But from the reign of *Edward the First*, the law has been otherwise. The statute 13 *Edw.* 1, commonly called the Statute of Westminster the Second, gave the writ of *elegit*, under which it has been the practice for centuries to proceed against the land. By the operation of that statute, all the freehold lands of the debtor became bound by the judgment from the time of its being entered. No alienation by the debtor can defeat this right; and if we compare the position of the chattels real or other personal property of the debtor in such a case, as they stood at the passing of the act before us, with that of his freehold estate, I question whether the latter must not be held to be in truth that which is substantially bound and charged with the judgment; the debtor having no means of relieving it from the liability but by pay-

ing the judgment; while in the case of personal property, he retains the full power of disposal freed from all charge by reason of the judgment until the moment when execution is actually issued against it. Accordingly, in *Finch v. The Earl of Winchelsea* (a), Lord Chancellor Cowper speaks of a judgment creditor as having "a legal lien upon the estate." So in *Brace v. The Duchess of Marlborough* (b), Lord Hardwicke, then the Master of the Rolls, though he says that a judgment passes no present interest in land, yet adds that it must be admitted to be a lien thereon. So in *James v. Thompson* (c), Lord Hardwicke, taking a distinction between a bond in which the heirs are bound and a judgment, that in the former case the heir may make the debt personal by alienating land descended before process against him, says, "but the judgment is a lien upon the land itself, and would have been so even in the hands of a purchaser for valuable consideration." I may here observe that the words of the act before us are not merely "a sum of money charged upon," but a sum of money "charged upon or payable out of any land;"—words which appear to import that the Legislature did not merely regard cases of express charge, such as mortgages, portions, legacies or charges of the like nature, but generally all sums of money the payment of which could be enforced against land by means of the security given by the party by whom it was payable: and therefore, even if the expressions I have quoted as to the general nature of a judgment debt and its operation as a charge or lien on land were more equivocal than they are, the construction of the particular act before us would not, I apprehend, be seriously affected. But considering the question independently of this distinction, those cases appear to me to go very far in establishing that to a certain extent at least, and quite sufficiently for the purpose of this case, a judgment may be considered as a charge or encumbrance on land:—at least, that there is no incongruity, no departure from legal principles in its being so considered. The judgment of the House of Lords in Ireland, in the case *Barnwall v. Barnwall* (d), has been referred to as an authority that a judgment cannot be so treated; and the language of Lord Clare, in that case, has been much relied on: but I think we may fairly uphold the decision there come to, and acquiesce in it as one based on substantial grounds, altogether independent of this distinction as to a judgment being or not being a charge upon land. The question there was, whether, under the 2 Anne, c. 6, s. 14 (one of the provisions of the penal code), a judgment entered in the Court of King's Bench should be enrolled in the Court of Exchequer. That section, which was enacted before the Registry Act, required that "all debts and other real encumbrances that shall or may charge

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(a) 1 P. Wms. 283.

(c) 9 Mod. 396.

(b) 2 P. Wms. 491.

(d) 3 Ridg. P. C. 24.

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"or encumber any real estate of any Papist, shall, within six months next after the making thereof, be enrolled in the Court of Exchequer, "in rolls;" "where all persons may at all seasonable times resort to and "have the perusal of the same;" and in default of such enrolment, the same should not charge the lands of any Papist, when and during such time as they should belong to a Protestant. Now it is obvious that the object of that provision was to secure publicity where it did not before exist; and that it was in no way requisite in the case of judgments, which were entered of record, and became at once matter of public notoriety and of easy ascertainment. And accordingly, the House of Lords decided in accordance with previous decisions of the Court, that such judgments did not require enrolment. Lord Clare very justly says they are not within the spirit of the act. His language is, "At the time when the "2 Anne, c. 6, was enacted, there was not a Registry Act in Ireland; "and the intention of the Legislature in framing this clause evidently "was, to compel Papists to enrol all *deeds* creating or giving a power to "create charges or other encumbrance upon their real estates, in the "Auditor-General's office, for the purpose of giving notice of them. In "the case of judgments obtained against them in the superior Courts, "this was altogether unnecessary, because the original enrolment of a "judgment in the Court in which it has been obtained is to every intent "as complete a notification of it to all mankind as a second enrolment of "it in the Auditor's office; and, therefore, the reason for enacting this "clause fails altogether in the case of judgments enrolled in the superior "Courts of Law." And then, after asking how was a judgment of the King's Bench or Common Pleas to be enrolled in the Auditor's office, he concludes thus: "And, therefore, if the question never had been "made, and if in this cause it had arisen before me, I should have been "of opinion that the letter or spirit of the statute of Queen Anne does not "extend to judgments enrolled in the superior Courts of Law." It is true that Lord Clare, in the first place, expresses himself in terms strongly expressive of an opinion that a judgment was not in itself an encumbrance affecting lands. He says—"First, a judgment is not in itself "an encumbrance affecting lands. By the Statute of Westminster, the "conusee may, if he shall elect so to do, extend a moiety of the freehold "estate of the conusor; but until the extent, the judgment does not "bind the land; and if the conusee shall levy the debt out of the "personal estate of the conusor, the judgment never can affect his freehold estate; and, therefore, in my opinion, a judgment is not a debt "or encumbrance coming within the letter of the act." I cannot help thinking, however, that the main strength and sound reason of his judgment rests on the passage I have first quoted, and not on this technical distinction about the precise character of a judgment in its operation on land; and I am the more inclined to take this view of the language of

Lord Clare in that case, from finding that, in a subsequent case in the same book, the same learned Lord uses language on this subject of somewhat different tendency, and more in conformity with that which I have quoted from Lord Hardwicke; and even pronounced a decision in the Court of Chancery much stronger than any thing we are called on to do in the present case. I allude to the case of *Haydon v. Carroll*, reported 3 *Ridg. P. C.* 545. That was a case arising on the act commonly called the Bankers' Act in Ireland, 35 *G. 2*, c. 14; by the second section of which it is provided that *all deeds and conveyances* that should be made by any banker, whereby any part of his real or leasehold interest shall be granted, released, sold, mortgaged, demised, "or in any way encumbered and affected," should be registered in the Registry Office; or in default, they should be deemed fraudulent and void against the creditors. Under this section, when the case came before him in the Court of Chancery, Lord Clare held that bonds were included as being deeds by which the estate of the banker might be affected—a construction of the act which has since been overruled by the opinion of the Court of King's Bench in the case of *In re Anderson* (a). The case came afterwards, upon other points, before the House of Lords; and Lord Clare appears to have regretted that this opinion as to bonds was not also made matter of appeal. Speaking of it in p. 612, of his judgment, he says he was of opinion, in the Court of Chancery, that such bonds should be registered, and intimates that this opinion was not changed; and then goes on to use the language respecting judgment debts, which bears upon the present question. "The act," says he, "provides that all 'deeds, by which any part of the banker's real estate or leasehold interest shall be in any way encumbered, shall be deemed fraudulent and void against his creditors, unless they shall be registered within a month from the execution. A bond is certainly a deed as much as a mortgage; if denied at law, the plea is *non est factum*; and the real estate or leasehold interest of the obligor, although not actually encumbered by a bond, yet may be as materially affected by it as by a mortgage. If it be accompanied by a warrant of attorney to confess judgment, and judgment be entered upon the bond, it becomes a lien upon the real estate, whether in fee-simple or freehold." Thus Lord Clare himself treats a judgment as a lien, as materially affecting land as a mortgage, and considers it as actually encumbering it; which a mere bond, he says, does not: and I, therefore, think we should not take a true view of his judgment in the case of *Barnewall v. Barnewall*, in resting it upon any mere verbal or technical distinction as to the precise force of the word charge or encumbrance, when there exist the just and solid grounds of the decision which I have already referred to:—founded on the object

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(a) 1 Co. & Al. 1.

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and policy of the act, and the mode in which it was to be, practically, carried into effect.

An expression of the late Lord Guillamore in the case of *D'Arcy v. Chambers* (a), has also been relied on in this part of the case, where he says, "A judgment it is true, strictly speaking, is no lien on the land: it is an encumbrance hovering over it." But in this language I find no authority for the position that a judgment cannot in any sense be called a charge or encumbrance. The expression, 'strictly speaking,' shews that the opinion must be taken with some qualification: and whatever be the meaning of the phrase 'hovering,' it is at all events here used as descriptive of the encumbrance created by a judgment; thereby admitting that to some extent at least, a judgment does so operate. We have also been referred to a case decided by the present Lord Chancellor of England, Lord Cottenham, *Neate v. The Duke of Marlborough* (b), where this subject has been incidentally discussed. The precise point decided in that case is merely this,—that a judgment creditor who desires to enforce his judgment against an equitable freehold estate by a bill in equity, must previously sue out an *elegit*;—a decision founded on the technical rule of a Court of Equity, as laid down by Lord Redesdale, p. 126, that "In any case to procure relief in equity, the creditor must shew by his bill, that he has proceeded at law to the extent necessary to give him a complete title;" and Lord Cottenham rests it on this principle, that the Court does not interfere to give the creditor more than what the Statute of Westminster, and an ejectment would have given him at law, had no circumstances interposed to defeat that legal title: and as that legal title is only given by the writ of *elegit*, so he cannot come to a Court of Equity by reason of the existence of impediments to the enforcing it at law, until he has placed himself in a condition to succeed at law, but for those impediments. It is true that Lord Cottenham uses some expressions which at first sight would go to deny the existence of any lien or charge on the land by force of a judgment. He says, "It is not correct to say that according to the usual acceptance of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right;"—but plainly there Lord Cottenham is not denying altogether that a judgment creates any lien on the land; he speaks rather of the mode of enforcing it, as distinguishing the operation of a judgment in equity from that of a specific encumbrance; and this is, I think, apparent from some preceding sentences of his judgment, in which he says, that for certain purposes the Court recognises a title by the judgment,—as for the purpose of redeeming, or, after the death of the debtor, of having his assets administered:—and he

(a) 1 Sch. & Lef. 476.

(b) 3 M. & K. 417.

says again, it gives to the judgment creditor the right to come in and redeem *other encumbrances* on the property. He further says the Court never sells the interest of a debtor subject to an *elegit* creditor; and he speaks of judgment creditors as being parties who *have charges* on the estate: using thus the very words "charges and encumbrances" as properly applicable to this species of security, and implying that there is nothing in the nature of a judgment which renders this application of those words incongruous or improper.

That a sum of money secured by judgment may therefore be considered, without any impropriety of expression, as a sum charged upon or payable out of land, I think the authorities I have referred to sufficiently establish. That it is so considered in the act before us, is apparent from the 40th section; and I cannot hold that it was not so considered and intended to be dealt with when the same words are used in the 42nd section, unless I find that the section is wholly inapplicable to such a case, or that from some inherent condition in the security itself, or some settled principle of law, the section cannot be so understood without necessarily producing inconsistencies and anomalies irreconcilable with such interpretation.

Then it is contended that this section has no application to the case of a judgment, because at law a judgment is recovered in a certain sum which as the law stood at the time of the passing of this act, and still stands as to judgments of the nature of that in question in this cause, did not in itself bear interest either at law or in equity. That a judgment recovered in an adverse suit did not bear interest, is not to be disputed; and it is equally indisputable that even in the case of a judgment recovered on a bond in a penalty, the sum so recovered is the ultimate limit of the liability of the defendant on such judgment; and that no interest can be recovered thereon beyond that penal sum. If the case rested there, no question could arise. No section of a statute limiting the amount of arrears of interest recoverable on a security could have any application to a security on which in point of fact no interest at all could become chargeable; and no payment of interest or acknowledgment of liability to interest could be called in aid of the construction of the statute, if we set out by assuming that the statute only applies to the absolute amount of the judgment, which confessedly bears no interest at all. But are we so to limit the application of the act? The question on this part of the case is, what is the sum secured by the judgment and thereby made chargeable on or payable out of land? If we are to try this by the ordinary practice of those who deal with these securities,—of those whose professional avocations are continually conversant about them,—or by the daily and hourly practice of the Courts before whom these securities come, must not the answer be, not the sum which ultimately may be recovered upon it,—not the penal sum, which cannot in any event be exceeded,—but the sum which it was originally given to secure; the

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sum which if paid before any interest at all accrues on it, is the only sum which the plaintiff can receive by means of it;—the sum which by the contract of the parties to it bears interest, and in respect of which interest may be paid, and for which interest acknowledgments may be given. Is not this the meaning of the terms “sum secured by judgment,” in the 40th section; and is not the interest there spoken of, interest on the principal sum? The language of that section is, that no action or suit or other proceeding shall be brought to recover any sum of money secured by judgment, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same; unless in the mean time some part of the principal money, or some interest thereon shall have been paid to the person entitled thereto. The words are identical. But they are not confined to this statute. They, or words analogous are found in the 8 G. 1, c. 4, s. 2, which recognises payment of interest as one means of saving the bar created by that section. Surely these words mean interest on the principal sum, not part payment of the principal. In every day's experience, on every motion for a receiver—on every motion to revive a judgment, the parties act on this view of the case and depose to the payment of the interest specifically at various periods sufficient to shew that the judgment is not barred, and to satisfy the Court as to the amount actually due on it. The 26th section of the recent statute, 3 & 4 Vic. c. 105, takes a distinction between the different classes of judgments in these words: it enacts, “That every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest, shall carry interest at the rate of four pounds *per centum per annum* from the time of entering up the judgment.” It is in the nature of a legislative declaration, recognising a judgment confessed upon a bond and warrant of attorney as a security for a principal sum of money bearing interest. I therefore see no adequate ground for saying that the 42nd section is inapplicable to the case of a sum secured by judgment and bearing interest as in the present case, so far as regards the general purport and object of its provisions; and on the contrary, finding that it will apply to such a case, and that according to what I have already stated such a case is within the terms of the section, I think we are bound so to apply it. One part of the section has been relied on as shewing that it applies only to cases of sums primarily chargeable on land, as they are described. I allude to the clause relating to the effect of the possession of the lands by a prior encumbrancer on the arrear of interest, and which suspends, as it were, the operation of the act during such possession. It was observed by Counsel in argument, and I concur in the observation, that the possession of a judgment creditor would be the possession of an encumbrancer within that proviso, and it is difficult to say that the word “encum-

branceer" is used in two different senses in the same section, or rather in the same sentence. But if it is meant to rely on this clause as shewing that the section only applies to cases of proceedings to recover interest *out of land*, I apprehend the argument goes a great deal too far. The mortgagee is expressly mentioned in it, and yet a mortgage is a security which is not necessarily limited in operation to a mere charge upon land: it is a present debt of the borrower, and he covenants by the mortgage deed to pay it: and what action or suit in a Court of Law can be brought to recover the interest on a mortgage out of the land mortgaged? I know of none but an ejectment to get possession of the land itself, in which the amount due or claimed is never called in question, and cannot be. An action or suit in this section and in the 40th must mean, at least must include, the ordinary personal action on a money demand in which the plaintiff seeks a general recovery of his debt, not limited to any species of property. The 40th section has repeatedly been so construed; and pleadings founded upon it are of daily occurrence. I think therefore that this last clause does not of itself present that conclusive exposition of the objects of the section for which it has been relied on. As to the title of the act—"An Act for the limitation of actions and suits relating to real property"—it is a maxim in the construction of statutes that the title of an act is not to be regarded in construing it; because this is no part of the statute; *Bac. Abr. Stat.* I. 2.; and the act itself shows in one instance—that of a legacy—that it does profess to regulate mere personal demands. This is clearly established by the case of *Shepard v. Duke (a)*.

But difficulties have been suggested as to the extent of the execution which may be issued at law on such a judgment, if it be held to come within this section; and it would, I admit, be very difficult to contend that there could be two separate executions for different sums on the same judgment;—or two different sums levied on the same execution, according to the nature of the property to be affected. So in the administration of assets, it is said there would be a different amount of charge on the real estate from that which would affect the personal. But if the provisions of the act are not limited to such proceedings as directly seek to raise the interest out of land; if they apply, as I think they must, to personal actions, and personal remedies for the recovery of sums chargeable on land in other instances, such as mortgages, it may be found that even at law the general words of the act would control the remedy by execution, and that the true construction of the act will be, to treat it as a general statute of limitation affecting all the modes in which such a demand may be enforced. We are not imperatively called on to decide that question in the present case; it is sufficient to say that I by no means accede to the argument that an execution could, since this statute, properly issue at

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law against the person or the chattels of the debtor on such a judgment as this, for more than six years' interest. In the present case the demand is sought to be enforced against the real estate of the debtor, and strictly speaking this is the only question we are called on to decide. In this form of proceeding, no doubt, the question of the extent of the judgment as a charge on the personal assets must also come in question, and we must consider the difficulties suggested in this view of the subject, if we hold this section to apply to judgments. But as has been justly observed at the Bar, these difficulties must equally exist in the case of a mortgage, to which in express terms the section applies; and they can only be dealt with in that case, as I apprehend, by holding that the operation of the section is general, as affecting all the modes of suit or proceeding for the recovery of interest on such a security; and consequently, that both as to the real estate and the personal, the limitation is the same.

Being therefore of opinion that the sum secured by this judgment is a sum charged on or payable out of land, and is so used in the section in question,—that the section in its enacting terms is capable of application to it, and that the difficulties suggested as to the consequences of such application are not in my judgment sufficient to outweigh what I conceive to be the plain intent and meaning of the enacting part of the section—but that it will rather be the duty of the Courts to overcome those difficulties, by moulding their proceedings in such cases in conformity with the general provisions of the statute, I concur in the opinion delivered by Baron Foster on a former motion in this cause, reported in 2 *Ir. E. R.* 374, in thinking that the creditor in this case cannot by virtue of the security in question recover more than six years' interest; and the sum found by the report must be reduced accordingly.

PENNEFATHER, B.

I fully concur in the very able judgment of the Chief Baron, and adopt the reasons stated by him. I certainly hesitated much before I came to the conclusion which I have now arrived at. I was influenced, perhaps, by the consideration of the number of persons who might be affected by this determination; but I am satisfied that any inconvenience arising from it must be submitted to. The Legislature has in plain terms enacted, that where a judgment is obtained upon a bond in a penal sum, where by the contract of the parties the principal money is to carry interest, there no more than six years' arrears of that interest shall be recoverable. The 40th section of the 3 & 4 *W. 4*, c. 27, clearly points at judgments as being charges upon land;—in express terms it declares them so to be; and there is no reason why the 42nd section, in which the general term, "any sum of money charged upon or payable out of land" is used, should not include judgments within its meaning and operation. The Legislature must be considered to have used the same

words in these two sections, which are conversant about the same subject-matter, in the same sense. It is upon that clear expression of the intention of the Legislature that my judgment is founded; and whatever expressions may be found in the cases to which we have been referred, apparently at variance with this meaning of the words, they must be considered as relative to the law as it then stood, and to the particular circumstances of the case then brought under the consideration of the Judge using them; and they cannot, as it appears to me, affect the meaning which the Legislature has by the 40th section affixed to these words. The two sections must in this respect receive the same construction. At first I was very much influenced by the decision of the Master of the Rolls, in the case of *Kealy v. Bodkin*. Great respect is certainly due to any thing which deliberately falls from that learned Judge. But it appears to me, that in so far as the judgment of his Honor is founded upon the opinion that a judgment is not a charge upon land, the statute itself gives a full and complete answer to it: and as to the difficulty he suggests, in different sums being leviable out of different species of property, by means of one and the same judgment, it is best answered by holding (although we are not called on to decide the question in the present instance), that the same sum must be levied for interest, whether the execution be directed against the lands or the person, or the personal property of the debtor. That appears to me to be the best solution which can be given to the difficulty said to exist by the Master of the Rolls. There is no reason to suppose that it exists at all, or that it was the intention of the Legislature that different sums in point of amount should be levied by different executions upon the same judgment. The language used in the statute is general, and sufficient to embrace every species of execution. If, however, we are to take into our consideration the anomalies arising from any particular construction of this section, a much greater one would exist by adopting the construction given to it in *Kealy v. Bodkin*, than any which have been suggested to arise from a contrary construction. Suppose a mortgage is executed, and a judgment in a penal sum is confessed to secure the payment of one and the same debt, with interest. By the express words of the act, six years' interest only can be levied out of the land by means of the mortgage; yet, according to the construction contended for, twenty years' interest upon the same debt might be levied out of the same land by means of the judgment. That would, indeed, be anomalous;—to hold, that on one and the same transaction, and in the case of securities passed at the same time, and affecting the same subject-matter, six years' interest only was recoverable by the one, and twenty years' by the other.

The judgment creditor in this case cannot, for the reasons assigned, take advantage of this suit as his suit. With regard to another creditor,

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who came in regularly under the decree in this cause, we held, upon the authority of *Sterndale v. Hankinson*, that he had a right to consider the suit as his from the time of its institution. We so ruled upon the principle, which, I think, is a sound one, that a creditor who is aware that a suit has been instituted, so far as he is concerned, for the very purpose for which he himself would have filed his bill, is perfectly justified in lying by and not instituting a second suit, which would have the effect of increasing costs upon the estate. But we cannot consider the present applicant as in that situation. He expressly states that he was ignorant of this suit until long after the decree and the report was obtained; and, therefore, cannot claim the benefit of it, as being his from the beginning.

Upon the construction to be given to the 3 & 4 Vic. c. 106. s. 26, which I mention, that it may not be supposed that it has escaped our observation, an anomaly may be hereafter found to exist. It in terms enacts, with regard to judgments not upon bonds in penal sums, that they shall carry interest at the rate of £4 per cent. per annum *until paid*; and if the words of that section are to be construed in their literal sense, it may be contended that twenty years' interest may be recovered upon judgments in case, although no more than six years' interest can be recovered upon a judgment on a bond in a penal sum, where, by the contract of the parties, the principal money is to bear interest until paid. It is a question which well deserves consideration. But that statute is expressly confined to judgments which do not, by the contract of the parties, carry interest; and the case before us is one in which the sum secured by the judgment is, for the reasons mentioned by the Chief Baron, to be considered as bearing interest.

RICHARDS, B.

I also fully concur in the judgment of the Court, and in the reasons assigned for it by the Chief Baron. The Master of the Rolls having, with much and anxious deliberation, pronounced a judgment upon this very question at variance with the conclusion we have come to, I felt, in common with the other members of the Court, that it was due to the abilities of that eminent Judge, and to ourselves, to examine fully the grounds of his opinion; and after having done so, I confess I am not able to adopt his reasoning. It occurs to me that the great strength of his judgment lies in the assumption, that by giving the act of Parliament the construction we now give it, this incongruity would exist, that upon the same judgment, the conusee might have an execution for one sum against the chattel property or the person of the conusor, whereas he could only have execution for a smaller sum against his land. If I were of that opinion, I confess I would have great difficulty in coming to a conclusion different from that of his Honor. It therefore appeared to

me that it was necessary I should come to some definite conclusion upon that point, ere I could dissent from the judgment of the Master of the Rolls; and in this process of reasoning, I may perhaps differ from the other members of the Court. I have accordingly done so, and have come to the conclusion that the creditor cannot have an execution for one amount against the personal property or the person of the debtor, in any case which falls within the 42nd section of the act, and an execution for another and different amount against his real estate. The statute applies generally to judgments, and to every mode of enforcing their payment. I think, with great respect and deference for the opinion of the Master of the Rolls, that he has permitted himself to be misled by considering these anomalies; which, however, he does not avoid by the construction he has put upon the act; for in the case of a mortgage, which is confessedly within the 42nd section, one sum may, according to that construction, be recovered by suing upon the personal covenant contained in the mortgage deed, and another and different sum, by proceeding directly against the land. I do not think that such is the case. For these reasons, in addition to those given by the Chief Baron, I concur in the judgment of the Court.

BRADY, C. B.

My Brother Foster has heard this case argued, but is not able to be present in Court to-day. He has, however, requested us to state that he retains the opinion expressed by him in his judgment in *O'Kelly v. Bodkin* (a).

(a) 2 Ir. E. R. 372.

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The committee and heir presumptive of a lunatic, who was absolute owner of a freehold estate subject to a charge of £900, paid off the charge out of his own monies, and had it assigned to a trustee for him. He subsequently applied to the Court for leave to apply the surplus rents of the estate towards payment of the charge; but there were then judgments affecting the lunatic personally, and the application was refused. When the judgments were paid, the committee paid off the charge out of the surplus rents, without any order, but was allowed the amount in passing his account: *Held*, that the next of kin of the lunatic had no equity to have it kept alive for their benefit.

Grimstone's case (2 Amb. 705) was rightly decided, and its authority is not shaken by the observations of Sir A. Hart, in *Weld v. Tew.* (1 Beat. 270).

JOHN BRADDELL being seized of two-thirds of the lands of Ballyshane, otherwise Johnstown, under a lease for lives renewable for ever, by articles bearing date the 30th of December 1755, executed previously to and in contemplation of his marriage with Anne Batt, agreed to convey his estate in the said lands to two trustees (George Braddell and Benjamin Batt), and their heirs, to the use of himself for his life, and after his decease, to secure a jointure for his intended wife; and, after the decease of the survivor, to the use of Henry Braddell, party thereto, for twenty-one years, upon trust to raise £200 for the younger children of the marriage, to be divided among them, as he John Braddell should appoint; and, subject thereto, to the use of such son or sons of the marriage as John Braddell should by deed or will appoint, and to the heirs male of such appointed son; and, for want of such appointment, to the use of the eldest son of the marriage, and the heirs male of his body; and, for want of such issue male, to the use of John Braddell and his heirs. The articles contained a provision enabling the trustees, after the decease of the intended wife, in case her intended husband should survive her, to raise £200 out of his real and personal estate; and, if there should be more than one younger child, then to raise £100 more.

The marriage took effect, but no deed was executed in pursuance of the articles, and Anne died in the lifetime of her husband, leaving three children, Henry, Benjamin, and Elizabeth.

In the year 1779, Benjamin, in consideration of £500 advanced him by his father, by deed poll, assigned to the father all his share of the sums provided for the younger children by the articles.

Besides the lands of Ballyshane, John Braddell was seized of the lands of Kilalongford under a lease for lives renewable for ever; and he, by his will bearing date the 22nd of July 1780, duly executed and attested, so as to pass freehold estates, after reciting the articles and the deed poll of 1779, gave to his daughter Elizabeth the moiety of the sums of £200, £200, and £100, assigned to him by the deed poll, and appointed to her the other moiety of those sums. The testator provided that in case of any difficulty in raising said sums off the said lands of Ballyshane, that his personal property and his freehold estate of Kilalongford should stand charged with said sum of £500, with interest from his death; and he gave to his said daughter the further sum of £400, in satisfaction of all claims upon his real and personal estate. He then gave all his real and personal estate, subject to the payment of his debts and legacies, to his son Henry, and appointed him and his (testator's) brother Mathew executors.

The testator died shortly afterwards, without having revoked or altered his will, which was proved by his son Henry.

Henry Braddell the son took possession of the real and personal estate of the testator, and having afterwards become of unsound mind, a Commission of Lunacy was issued, bearing date the 2nd February 1785, under which it was found that he was of unsound mind since October 1784, and that he was then seized of an estate for lives renewable for ever in the lands of Ballyshane and Kihalongford, and of personal property to the amount of £400.

Benjamin Braddell, the brother of the lunatic, was appointed committee of the fortune, by order bearing date the 5th February 1785.

Elizabeth Braddell had married William Newcombe (the father of plaintiff), and he, on the 17th of March 1795, filed his bill in Chancery against Henry Braddell, for the purpose of raising the £900 to which she was entitled. On the 22nd of July 1795, a reference was directed in the lunacy matter to the Master, to inquire whether the sum of £900 was charged on the lunatic's estate; and the Master, on the 10th of August 1795, reported that it was.

Upon the 18th of August 1795, Benjamin Braddell, who was the heir presumptive of the lunatic, applied to the Court for liberty to pay off the £900 out of his own monies, and have it assigned to a trustee for him; and, by an order of that date, it was declared that he should be at liberty to do so, and should be allowed the interest on the £900 upon passing his accounts.

Benjamin Braddell accordingly paid the £900, and took an assignment of the charge to Thomas Braddell, as a trustee for him.

Benjamin Braddell having petitioned the Chancellor to be allowed, in passing his accounts, certain sums alleged to have been advanced by him, an order was made on the 28th of January 1805, referring it to the Master to inquire and report what were the circumstances of the lunatic.

Under that reference, the Master made his report upon the 6th of March 1805, finding that the lunatic was seized of the denominations of lands mentioned before, and that his personal property amounted to £381. 16s. 3½d., the expenditure of which had been regularly accounted for. The Master further found that the freehold lands were subject to the charge of £900, mentioned before; to a judgment against the lunatic for £300 principal; to an annuity of £14 created by the will of the lunatic's father; to a judgment obtained by one Hall, against the lunatic, for £100 principal; to another judgment obtained against him by one Foley for £64. 10s. 5d. principal; and that the lunatic owed a debt of £50 secured by bond and warrant of attorney. He then reported the circumstances relating to the assignment of the £900, and further found that two of the judgment creditors having threatened to take proceedings for the recovery of their debts, Benjamin

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Braddell paid the amounts due to them out of his own monies, and took assignments of their judgments.

Benjamin Braddell having petitioned the Court for liberty to apply the surplus rents of the lunatic's estate in discharge of the encumbrances affecting the same, another order of reference was made in the lunacy matter on the 29th January 1800, referring it to the Master to inquire and report which of the debts and encumbrances mentioned in the report of the 6th of March 1805, ought to be considered as a debt of the lunatic, and payable out of his personal estate in exoneration of his real, and which ought to be considered as debts affecting his real estate only.

Under that reference the Master made his report upon the 4th of June 1806, finding that the charge of £900 was to be considered a debt affecting the real estate descending to the lunatic from his father, with that charge upon it; and that upon the death of the lunatic his heirs would not be entitled to require the aid of his personal estate, to pay the principal, but only the interest of the said charge; and that the personal estate was liable in the first instance, in exoneration of the real estate, to the payment of the other debts and encumbrances mentioned in the report of the 6th of March 1805.

The last mentioned report was confirmed by an order bearing date the 13th of June 1806; and Benjamin Braddell, as committee of the fortune of the lunatic, was by the same order declared at liberty to apply so much of the rents as should be sufficient to pay the interest on the £900, and to pay the principal and interest of the judgment debts.

The judgment debts were shortly afterwards paid off by Benjamin Braddell out of the personal property of the lunatic as far as it would extend, and the residue out of the rents of the real estate.

Benjamin Braddell, as committee of the lunatic's fortune, continued to pay the interest of the £900 until 1811, when he paid the principal to the trustee, out of the accumulation of the rents of the lunatic's real estate, and was allowed the amount in passing his account; but no instrument was executed releasing the lands from the charge.

Henry Braddell, the lunatic died on the 25th of September 1838, intestate, and without having ever been married, leaving plaintiff his only next of kin, and the defendant William Wingfield Newcombe a minor, his heir-at-law; and plaintiff shortly afterwards obtained administration to him.

By an order bearing date the 10th of November 1838, made in the lunacy matter, it was referred to the Master to inquire and report the nature and amount of the property of the lunatic; and whether there were at the time of his death any debts or encumbrances affecting the same; and who upon the death of the lunatic became entitled to his property, whether real or personal, and who were his next of kin.

The Master made his report under that order, upon the 16th May 1839,

finding that the lunatic was seized of the freehold lands before mentioned, and that he was possessed of personal property consisting of a sum of stock in the funds, cash in the Bank of Ireland, a balance in the hands of the committee, and arrears of rent due by the tenants. That plaintiff was his only next of kin, and the defendant his heir-at-law; that all debts affecting his personal estate, had been paid, and that there were no charges affecting the freehold estate, except that plaintiff as next of kin claimed to be entitled to the £900, as to which the Master reported specially the facts before stated.

By an order bearing date the 1st of June 1839, the stock was directed to be transferred, and the cash paid to the plaintiff, but the Court made no order as to the £900, leaving plaintiff to file a bill. Accordingly on the 8th of February 1840, plaintiff filed his bill, setting out the facts as herein stated, and praying that the sum of £900 might be declared well charged on the freehold estate of the lunatic, and that the payment of that sum out of the rents of the lunatic's freehold estates might be declared a payment for the benefit of his personal estate, and that plaintiff as his sole next of kin and administrator, might be entitled thereto.

Mr. *Warren*, Q. C., Mr. *W. Brooke*, Q. C., and Mr. *Reeves*, for the plaintiff.

The principle upon which the Court acts in lunacy matters, is laid down by Lord Hardwicke in *Ex-parte Marchioness of Annandale* (a), thus:—"In cases of lunacy it is a rule never departed from, not to vary the property of the lunatic, so as to effect any alteration as to the succession to it." Accordingly in *Degge's* case cited by Sir A. Hart, in *Weld v. Tew* (b), a mortgage of the lunatic's real estate, which had been paid off out of the personalty, was directed to be assigned in trust for the personal representatives of the lunatic. The defendant relies on the circumstance that the charge in the present case was paid off out of the rents of the real estate, as creating a distinction, but there is only one case in which that distinction has been acted on, viz., *Grimstone's case* (c). The decision in that case, however, is contrary to a preceding decision made in the same matter by the same Judge (Lord Apsley), and has been disapproved of by succeeding Judges. In *Weld v. Tew* (d), although it was not necessary to decide the point, Sir A. Hart expressed his dissent from *Grimstone's case*. In *Ex-parte Whitbread* (e), Lord Eldon says, "the Court does nothing wantonly to alter the lunatic's property, but takes care that when he recovers he shall find his property as nearly as possible in the same condition as when he left it." In *Ex-parte Earl Digby*, In the matter of the *Duchess of Norfolk* (f), the exact

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(a) 1 Amb. 80.

(c) 2 Amb. 705.

(e) 2 Mer. 99.

(b) 1 Beat. 270.

(d) *Ante*.

(f) 1 Jac. 641, and 1 Jac. & Wal.

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point arose, and though no decision was made in consequence of the form of the proceedings, yet Lord Eldon expressed his opinion that the next of kin were entitled, the parties acquiesced in his opinion, and the case was never carried farther. In *Ex parte Hind*, reported in the note to *Grimstone's case* (a), as similar doctrine to that in *Digby's case* was laid down. If therefore the case rested merely on the mere legal point we would be entitled to succeed, but in addition to that there are special facts in this case entitling us to the decree sought. The conversion was a plain violation of duty on the part of the committee. He applied for an order to pay this money and the Court refused his application as to the principal, and allowed it as to the interest only. It is a well established principle of the Court, that an act done by one in a confidential situation is not to be turned to his own advantage; and the question before the Court is to be considered exactly as if nothing had been done respecting this sum of £900.

In the cases relied on, on the other side, attempts were made after the death of the lunatic to undo what had been deliberately done by the Court in his lifetime. Here we only want that the unauthorised act of the committee shall not affect the rights of the parties contrary to the intention of the Court. In *Ex parte Bromfield* (b), Lord Thurlow laid it down that where property had been converted by a committee or guardian with a view of serving his own interest, there arises an equity to undo the act; and that where guardians or committees have taken upon themselves to change the property, the Court will look upon it as a fraudulent management. In *Awdley v. Awdley* (c), the committee of a lunatic having invested part of his personal property in the purchase of lands, it was held to be a trust for the next of kin. In *Ex parte Ludlow* (d), a committee having laid out part of the lunatic's personal property in the repair of a barn instead of taking timber for the purpose off the land, it was held that he should make good the amount to the personal estate, for he appeared to have done it merely with a view to his own interest, being next in remainder to the real estate. In *Sergison v. Seely* (e) the Court refused to alter a disposition of the lunatic's personal property, which had been laid out in real estate before the issuing of the commission, but after the time to which the finding went back. In *Ware v. Polhill* (f), personal property of an infant having been laid out in the redemption of the land tax, it was held to be a trust for the next of kin. In *Tullett v. Tullett* (g) it was held that timber cut down by an infant's guardian during his minority belonged to his heir-at-law. That case was followed in *Powlett v. Duchess of Bolton* (h). The case of an infant

(a) 1 Amb. 706.

(c) 2 Ver. 192.

(e) 2 Atk. 411.

(g) 1 Dick. 322.

(b) 1 Ves. jun. 453.

(d) 3 Atk. 407.

(f) 11 Ves. 257.

(h) 3 Ves. 373.

is distinguishable from that of a lunatic, because in the former the infant's power of disposition is affected by the conversion, and the Court, therefore, will prevent any act of his guardian from doing so. In the case of *Ingwood v. Twyne* (a), relied on on the other side, there were three special circumstances to distinguish it from the present.—First, there was no mortgage. Secondly, the purchase of the jointure was effected at the instance of the mother, who afterwards sought to have it declared a trust for the next of kin. Thirdly, it was the deliberate act of the Court. The decision in that case is correct: the *dicta* are contradicted by the cases before referred to.

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Mr. Pennefather, Q. C., Mr. Blackburne, Q. C., and Mr. Thomas Nugent, for the defendant.

The construction of the orders made in the lunacy matter has been mistaken on the other side. The Court did not in 1805 and 1806 decide that it would be improper to apply the surplus rents to the payment of the £900, but merely that that was not a proper time for such an application, as there were debts to which the lunatic was personally liable still unpaid, which ought to be paid off first. No order was obtained authorising the payment to be made, but such authority is unnecessary, because if the act be proper in itself—and such as the Court, if consulted upon the subject would have approved of—it will sanction it when done without its leave. The application of the rents in payment of this charge formed part of the accounts of the committee since 1811, and therefore it must have received the sanction of the Master. The case of a minor is analogous to the present; but this is *a fortiori*, because the minor has an interest in retaining the personal property, and yet the Court will apply it in exoneration of the real estate where it appears to be for the infant's benefit. In *Ingwood v. Twyne* (b), a jointure charged on an infant's real estate was, under the direction of the Court, purchased out of the personal property of the infant, and the jointure was assigned to a trustee for the infant. The infant died shortly after coming of age, intestate and unmarried, and the next of kin presented a petition, claiming to have the purchase declared a trust for them—but the Lord Chancellor held, that there was no such equity as they contended for, and dismissed the petition. The case of *Earl of Winchelsea v. Norcliffe* (c) is in point; for there, although a purchase made by trustees of an infant during his minority, of their own authority, was declared a trust for the next of kin, yet it was laid down that if the trustees had obtained a decree for investing the money, the Court would have maintained its own decree. In *Oxenden v. Compton* (d), a bill filed by the heir-at-law of a lunatic

(a) 2 Eden, 140.

(c) 1 Ver. 434.

(b) 2 Eden, 148.

(d) 2 Ves. jun. 74.

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against the next of kin, to have the benefit of a sum of money produced by the sale of timber on the lunatic's estate, which had been cut down under an order of the Court, was dismissed by Lord Loughborough upon the ground that there was no equity between the real and personal representatives of a lunatic, who must take the property as they find it at his death. In *Ex parte Phillipps* (a), it was held that the next of kin of a lunatic had no equity against the heir-at-law in respect of the produce of timber on the lunatic's estate, which had been applied in redemption of the land tax. In that case the Chancellor draws the distinction between the case of a lunatic and that of an infant, viz., that the former on his recovery has the same power of disposition over one species of property as the other. *Grimstone's case* (b), which is directly in our favour, was most elaborately canvassed, having been three times the subject of discussion; and upon the second re-hearing before Lord Apley, assisted by De Grey, C. J., and Smythe, B.,—his Lordship and Chief Justice De Grey were of opinion that the original order pronounced by Lord Northington was right, and that his own first order varying that was wrong. There is no decision opposing that. In *Weld v. Tew* (c) the point did not arise; and Sir A. Hart's observations upon *Grimstone's case* are, therefore, extrajudicial: and neither in *Ex parte Whitbread* (d) nor in the *Duchess of Norfolk's case* (e) was there any decision. We have, therefore, on our side the authority of Lord Northington, Lord Apley, De Grey, C. J., Lord Thurlow, Lord Rosslyn, and Lord Manners. But even looking at this, independently of authority, there is no equity in favour of the next of kin, who have had the benefit of the increased savings from the real estate since 1811, in consequence of the outgoings having been diminished by the amount of the yearly interest on this sum of money.

Mr. Reeves in reply.—A decision for the plaintiff in this case would not clash with any *dictum* or decision; while a decision in favour of defendant would be opposed to the authority of *Digby's case*, and to the opinion of Sir A. Hart in *Weld v. Tew*. There is a distinction between an ordinary trustee or guardian and the committee of a lunatic. The latter derives his authority solely from the Court, and is looked upon as a mere bailiff; *Beverley's case* (f). The strictness with which a committee is regarded even by the Court itself, appears from the case *Re-Cooper* (g), where an application that the committee might be allowed to manage the estate under the directions of the Master was refused. In *Anonymous* (h), repairs of a lunatic's estate made by the committee without a previous

(a) 19 Ves. 118.

(c) *Ante*.

(e) *Ante*.

(g) 1 My. & Cr. 33.

(b) *Ante*.

(d) *Ante*.

(f) 4 Rep. 127, b.

(h) 10 Ves. 103.

order were disallowed, although reported by the Master to be necessary ; and similar decisions were made in *Ex parte Martin* (a), and *Ex parte Hilbert* (b). If this had been done by the order of the Court it could not be undone, and it must be admitted that the Court *could* have ordered it, but it *would* not have done so. *Grimstone's case* is the only one in which it was done ; and it appears from *Oaenden v. Compton* that it was done by order of the Court. In *Ex parte Hogan*, cited in *Weld v. Tew* (c), a mortgage of an estate which had descended upon the lunatic and was paid off out of the personalty, was declared a trust for the next of kin. The estate in the present case has never been exonerated from the charge, which still subsists.

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In this case there appears to be a considerable conflict of authority, and I shall not give any decision without looking into the cases cited. I own I should feel great difficulty in deciding in opposition to the authority of Lord Eldon, but on the other hand there are previous authorities which it is impossible to reconcile with his decision. There is the authority of Lord Northington, who, although he was not perhaps as subtle in taking distinctions as other Judges, yet possessed a strong clear intellect, and is as high an authority upon any case involving a general principle as any other. Then there is, besides, the authority of Lord Apsley ; and his authority is the stronger because his original opinion was adverse to that of Lord Northington, and when the case came before him a second time he retracts the opinion which he had formerly expressed and assents to that of Lord Northington : upon the second occasion he was assisted by De Grey, C. J., and by Mr. Baron Smythe, the former of whom expressed an opinion in conformity with that of Lord Northington. Here then we have the decisions of three Judges, Lord Northington, Lord Apsley, and De Grey, C. J., and in addition we have the authority of Lord Rosslyn and of Lord Thurlow, who express their approbation of Lord Northington's doctrine. Thus we have the authority of five Judges, of whom three directly decided the point, and the other two expressed their approbation of the decision.

I have the most unfeigned respect for the authority of Lord Eldon, and certainly attach much greater weight to an expression of his opinion in the manner in which he has expressed it in *Digby's case* than I would to similar expressions coming from other Judges, in consequence of his well known habit of expressing his opinion on difficult questions in the shape of a doubt. Thus we often find that what is thrown out as a doubt by Lord Eldon, becomes after some time the settled law of the Court. The sum-

(a) 11 Ves. 397.

(b) 11 Ves. 397.

(c) 1 Beat. 271.

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mary way, however, in which that case of *Ex parte Digby* came before Lord Eldon, and the fact that the previous authorities the other way were not cited, and also the circumstance that he did not refer to the distinction between a tenant for life with intermediate remainders intervening between his life estate and the ultimate reversion to himself in fee, and a tenant in fee-simple, greatly lessen its authority in my mind. I am anxious to decide the present case, if possible, without entering into the conflict of authorities, if there are facts in the case sufficient to enable me to do it. I shall, however, look carefully unto the authorities, and the facts of the case, before I give my decision.

Feb. 26.

The LORD CHANCELLOR this day delivered the following judgment:—

I have desired this case to stand over, not because of any difficulty which I should have had in deciding it, if it stood clear of any authority, but from the difficulty of deciding, as at first I feared would be necessary, between the conflicting authorities of *Grimston's case* and of *Ex parte Digby*, (*The Duchess of Norfolk's case*).

If it were necessary for me, in the present case, to decide between those conflicting authorities, I should require further argument and further consideration; but it does not appear to me that there is any necessity for any such decision. It is true that in *Earl Digby's case*, no decretal order was made—the case was never mentioned again after Lord Eldon's expressions; but he threw out his opinions in the manner habitual to him in other cases, and which I must therefore consider an authoritative expression of his opinion.

The present case, however, is not the same as that in which that opinion of Lord Eldon was expressed. In *Earl Digby's case*, the Duchess of Norfolk was tenant for life; and it is upon that ground that Lord Eldon proceeds: he states the rights of a tenant for life who pays off encumbrances, and says, "In general, if a tenant for life, with a power of charging, makes a charge, his general personal estate will not be liable to exonerate the land; and, in general, if he pays it off, he becomes an encumbrancer on his own estate" (a).

Thus he treats her as a tenant for life who had paid off an encumbrance on the estate, and thereby become an encumbrancer on it. But that is not like the present case. This is a case where the plaintiff seeks the benefit of a charge of £900, not an original charge affecting the inheritance paid off by a person having only a limited interest in the property, but a charge paid off out of the rents by the absolute owner, and the question is between the heir and executor of that party. John Braddell, the lunatic, was entitled to the estate subject to this charge of £900: Benjamin Braddell, who had become entitled to

(a) Jac. 288.

the charge, was the committee of the lunatic ; and he applied the rents of the lunatic's estate in satisfaction of that charge ; and whether he did so in exoneration of the real estate, or whether that charge is to be deemed subsisting for the benefit of the lunatic's next of kin, is the question which the Court has now to decide.

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It is admitted, that the lunatic was seized *quasi* in fee of the estate which was subject to this charge. Now, what is the law where a person seized in fee of an estate pays off an encumbrance affecting that estate ? Is it not that such payment shall be presumed to have been made in exoneration of the estate ? The law is exactly the reverse where a tenant for life does any such thing, it is there presumed that he paid off the charge for his own benefit, and that charge is considered to subsist unless he does some act to merge it. For what reason then is it said, that where an owner in fee-simple pays off an encumbrance, that encumbrance shall be considered merged, unless some act of his to the contrary be shewn ? Because, it is for the benefit of the party himself, that it should be so, and because the payment is considered to be made for the saving of the estate. Now, what was the effect of the payment in this case—from that moment the term became in the consideration of equity vested in the party paying it off, and the charge merged ; and the same consequence would have followed if the charge had been assigned to a trustee for the lunatic. There was an end of this charge in the consideration of equity from the moment that it was paid. The executor, however says, that if it had been ascertained in the lifetime of the lunatic, that it would be for the benefit of the lunatic to have this charge paid off, that then it would have been an exoneration of the inheritance : but as that was not done, that the charge still continues in existence. But though it was not ascertained by any precise reference, yet the general rule of law ascertains it ; the law says, it is for the benefit of the absolute owner of an estate, that a charge affecting it should be paid—and here that very thing was done in the life of the lunatic.

This latter observation brings me to the consideration of *Grimstone's case* ; the effect of which has, I think, been a good deal misunderstood. In that case, the charge had been paid off in the lifetime of the lunatic : and when Lord Northington came to make the first order, he acted on the ground that the thing had been done in the lunatic's life by the act of the party, and ought not to be undone after his decease ; and he declared that the term created to secure the charge should attend the inheritance. This order of Lord Northington was afterwards reversed by Lord Apsley, but it came afterwards to be reconsidered by Lord Apsley, who had the assistance of Lord Chief Justice De Grey, and Mr. Baron Smythe. This makes it a very strong case indeed ; for on hearing the argument of Lord Chief Justice De Grey, Lord Apsley rescinded the order which he had himself pronounced upon the former hearing, and adopted Lord Northington's order.

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This case, it is said, has been contradicted by other cases, but I cannot find that any other case does contradict it: on the contrary I find that Lord Loughborough, in considering the ground upon which *Grimstone's case* was decided, distinctly puts it upon the ground that the thing had been done in the lifetime of the lunatic, and that there was no equity between the heir-at-law and the next of kin of the lunatic to undo it after his death. This is most important; for if so, the case comes to this—shall the fact that the payment was made out of the rents of the real estate make a difference? If it were necessary to decide that in the present case, I should require further argument before I made any decision upon it; but it would require strong argument to shew me the next of kin of the lunatic had any equity after his decease, to alter what had been done in his lifetime. When Sir A. Hart comes to consider this he says, “What merits has the heir-at-law, and what equity has he? It must be answered, none.” Now, if he had been fully apprised of the ground of *Grimstone's case*, he would have seen that there was every equity, because the thing had been done in the lifetime of the lunatic by the act of the Court. Here the thing is done by the act of the law; because, when the charge is paid off in the lunatic's life, the law says that that payment is made in exoneration of the estate for the benefit of the lunatic, who was the absolute owner of the estate charged. It being done, then, by operation of law, shall it not be as effectual as if it had been done by actual assignment? The law attributes the same effect to acts of this nature done for persons labouring under disability, as if it had been done by themselves, and no distinction has ever been drawn on that account. For this reason, therefore, I think the present case does not require any decision between Lord Northington's decision in *Grimstone's case*, and the opinion of Lord Eldon, as expressed in the case of *Earl Digby*. The former decision has been confirmed by Lord Loughborough and by Lord Thurlow; and, therefore, there is not, in my opinion, a case of higher authority to be found in the books.

It is true that Sir A. Hart, in *Weld v. Tew*, threw out some disapprobation of *Grimstone's case*; he did not, however, decide the case upon that ground, for the question did not arise in the case before him. His opinion in that case was a mere *dictum*, not at all called for by the case before him: and although I have a great respect for the opinion of Sir A. Hart, and a great affection for his memory, it is too much to say that by a mere extra-judicial *dictum*, so well considered a decision as that in *Grimstone's case* shall be overruled, supported as it is by succeeding Judges, and resting on the combined authority of Lord Northington, Lord Apsley, Chief Justice De Grey, Lord Rosslyn, and Lord Thurlow. The view which I have taken of this case, viz., that there is a merger of the charge, meets the objection that it has not been found that it would have been for the benefit of the lunatic to have this charge

paid off; for the general principle of law declares that it would be so, without any necessity for the interference of the Court.

It is admitted on the part of the plaintiff, that if this payment had been made by the authority of the Court, that would have prevented any question respecting it. Now, in my opinion, what has been done amounts to the same thing. Applications had been made by the committee, in 1805 and 1806, to the Court, for permission to apply the rents in discharge of the principal of this encumbrance; and those applications were refused, because, at that time, there were judgment debts of the lunatic, which, of course, should be paid off. The orders made upon those applications, however, decide nothing upon the question at present before the Court. By them the committee was allowed for all sums paid on account of interest upon this charge, but not for any payments in discharge of the principal, because of the existence of the judgments, to which the personal estate should be first applied. In 1811, when the judgments were all paid off, credit was claimed and allowed against the estate of the lunatic, for payments on account of the principal money. This was allowed by the Master in passing the account, and has been allowed in every subsequent account down to the death of the lunatic. It has thus been acted on since 1811, and the result is, that ever since, the personal estate of the lunatic has been benefited by the increased savings which have taken place in consequence. This charge that was paid off was bearing interest at £6 per cent.: and, in point of fact, it was beneficial to have paid it off. It is said that no order was ever procured to sanction this payment; but where a thing would have been ordered by the Court to be done, if an application had been made for that purpose, the want of that order shall not prejudice it when done. The plaintiff, by his bill in this case, seeks to undo what was done in the life of the lunatic, and what was acted on for twenty years. He has failed, in my opinion, in making out any case to sustain his claim; and I shall, therefore,

Dismiss his bill, with costs.

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Re Ls.

JOHN WALSH, acting Executor of WALTER
 WALSH, deceased, *Petitioner*;
 MATHEW KEANE and MARYANNE his wife,
 and RICHARD BAYLY, *Respondents*.*

(In the Rolls.)

Jan. 30.

A judgment creditor is entitled to a receiver under the 5 & 6 W. 4, c. 55, in every case in which he could at law issue an *elegit*; therefore, in such case, although the parties in possession may come in and shew, as cause against the appointment of a receiver, such an equitable defence as upon a bill filed for that purpose would probably entitle them to a decree, the Court will appoint the receiver on the judgment creditor's petition, but retain the fund until the party relying upon the equity has had the opportunity of having it regularly established by a decree.

THE petition in this matter was under the 5 & 6 W. 4, c. 55, and stated that under and by virtue of a certain deed, bearing date the 24th of December 1803, made previous to and in contemplation of the marriage of William Bayly and Anne Bayly otherwise Barron, his wife, the said William Bayly became entitled to an estate for lives renewable for ever, in part of the lands of Shanacool, in the county of Waterford, in the said deed and in the petition particularly described; and that being so entitled, he passed to the petitioner his bond for £200, with warrant of attorney for confessing judgment thereon, bearing date the 1st of October 1816, on which the petitioner entered judgment as of Trinity Term 1819.

That the said William Bayly died intestate and without issue in September 1821, leaving his brother, the respondent Richard Bayly, his heir-at-law; and that soon after his death the other respondents, viz., Keane and wife, usurped, and from thence continued in, and still retained to themselves and their undertenants the possession of the said part of the lands of Shanacool, to which the said William Bayly was entitled as aforesaid, claiming to be entitled thereto under a deed bearing date the 18th of August 1820, but which was neither executed nor registered until after the death of the said William Bayly; and that the said lands now produced an annual profit rent of £119.

That in Michaelmas Term 1831, the petitioner issued a *scire facias* to revive the said judgment against the heir and tenants of the said William Bayly, which having been duly served, the said respondents Keane and wife pleaded thereto, denying that the said William Bayly was seized in fee or freehold in the premises in question; and that the petitioner having joined issue, the same was tried at the Waterford Summer Assizes in the year 1838, when there was a verdict for the petitioner; and a point having been saved on the trial at the instance of the respondents' counsel, it was afterwards argued, and ruled with costs in favour of the petitioner. That the petitioner caused final judgment to be marked at foot of the said revived judgment, as of Michaelmas Term 1839, and that there was now due on foot of the said judgment

* An earlier publication of this case was accidentally prevented.

(including the costs of the plea of the respondents Keane and wife, which had been taxed as between party and party to the sum of £166. 15s.), the sum of £445. 3s. 6d. over and above all just credits and allowances whatsoever.

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The petitioner therefore submitted that he was now entitled to sue out an *elegit* on the said judgment against the said part of the lands of Shanacool for payment of the said sum so due as aforesaid, and prayed the appointment of a receiver pursuant to the provisions of the 5 & 6 W. 4, c. 55.

A conditional order for a receiver, pursuant to the prayer of the foregoing petition, having been obtained, the respondents Keane and wife now came in to shew cause against it; and in their affidavit set forth a statement of title, of which the following is the substance:—

In the year 1746, the then Earl of Grandison being seized in fee or of some other sufficient estate in certain lands in the county of Waterford, and, amongst others, of the lands of Shanacool, in the said county, by indenture bearing date the 5th of May 1746, demised the said lands of Shanacool, for three lives renewable for ever, to one George Bellamy, at the yearly rent and renewal fines thereby reserved.

In 1755, George Bellamy gave to John Everard, as a marriage portion with his niece Anne Rea, on her marriage with the said Everard, his bond in the penal sum of £3000 conditioned for payment of £1500 and lawful interest; and warrant of attorney for confessing judgment thereon, bearing date respectively the 16th of October 1755; on which the said Everard entered judgment as of Easter Term 1756.

George Bellamy afterwards made his will duly attested, &c., bearing date the 3rd of November 1756, whereby he devised all his estate and interest in the lands of Shanacool, under the said lease, to one Gaham and one Butler, and the survivor of them, and the heirs and assigns of of such survivor, upon trust, as soon as conveniently might be after his decease, to sell and dispose thereof; and out of the produce to pay his just debts, and particularly, and in the first place, the judgment debt due by him to John Everard; and after payment of his debts, he bequeathed to his said niece Anne Everard otherwise Rea, to her sole and separate use, notwithstanding her coverture, the sum of £1500, if the sale of the said lands should produce so much after payment of debts; and of his said will appointed his wife Anne Bellamy and the said Gaham and Butler executors, and died soon afterwards without altering or revoking his said will, which was duly proved by the executors.

In 1764 John Everard died intestate, leaving Anne Everard otherwise Rea his widow, and three children, only issue of the marriage, namely, William Everard, John Everard and Anne Everard, him surviving; whereupon his widow Anne Everard took out administration to him.

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In 1775 Anne Everard, the widow and administratrix of John, died intestate, leaving the said three children, issue of her marriage with John Everard, surviving her; and thereupon, William Everard and Anne Everard, the eldest son and only daughter, issue of the marriage of John and Anne Everard deceased, obtained administration *de bonis non* to their father, and thereby became entitled, as his personal representative, to the sum due on the judgment against George Bellamy; and also, in right of their mother, to the residue of the produce by sale of the said lands of Shanacool, after payment of George Bellamy's debts.

Anne Bellamy the widow, and Gaham, one of the trustees of the will of George Bellamy, died previous to the year 1783, leaving the said Butler the surviving trustee and executor of the said will; and, in or previous to the said year, Anne Everard, the daughter of John Everard and Anne his wife, intermarried with one Peter Bayly. The legal estate of Shanacool, under the lease of 1746, being then vested in Butler as the surviving trustee of George Bellamy,—

By indenture of the 17th of March 1783, made between the said Butler, as such surviving trustee, of the first part; and the said Peter Bayly and Anne Bayly otherwise Everard, his wife, and the said William Everard and John Everard, brothers of the said Anne Bayly (the said William Everard and Anne Bayly being described in their said characters of personal representatives), of the second part; and one James Gee, of the third part; after reciting the said lease of 1746, and the judgment against George Bellamy, and the said Bellamy's will, &c., the said Butler assigned all the estate and interest under the said lease to the said James Gee, as a trustee for the parties named of the second part in the said indenture.

By a certain other indenture of the 18th of April 1786, made between the said James Gee of the first part; and the said Peter Bayly and Anne his wife, and the said William Everard and John Everard, brothers of the said Anne, of the second part; after reciting the said deed of the 17th of March 1783, it was declared that the said assignment so made to the said James Gee was accepted by him to the uses and upon the trusts following:—"To permit and suffer the said Peter Bayly and Anne his wife to have, hold and enjoy one-third of the said farms and lands of "Shanacool, subject to one-third of the yearly rent and one-third of the "renewal fines reserved by the said lease of 1746, for and during their "joint lives, and the survivor of them for and during his or her life; "and from and after the death of the survivor to be held and enjoyed "by such child or children of them the said Peter Bayly and Anne his "wife as should be living at the death of the survivor of them the said "Peter and Anne, in such shares and proportions as the said Peter "Bayly in his lifetime, or the said Anne Bayly, in case she should sur-

"give him, should by deed or will, direct limit or appoint; and if there "should be only one such child, such child to take the estate." As to one other third, to permit and suffer the same to be held and enjoyed by the said William Everard, his heirs and assigns for ever, subject to one-third of the reserved yearly rent and one-third of the renewal fines; and as to the remaining one-third, to permit and suffer the same to be held and enjoyed by the said John Everard, his heirs and assigns for ever, subject to one-third of the reserved rent and renewal fines. This deed was duly registered on the 9th of May 1786.

On the 6th of January 1791, the said Peter Bayly and wife and William and John Everard executed a deed of partition of the lands of Shanacool, whereby one-third part therein particularly described (being the lands in the petition mentioned), was allotted as their share to the said Peter Bayly and wife; and the other two-thirds to the said William and John Everard respectively: and thereupon the said third parts or shares were, and ever since continued to be held in severalty; but no further deed was executed for the purposes of vesting in the several parties entitled, the legal estate in the several shares or divisions of the said lands.

In the year 1801, Peter Bayly and wife procured a renewal of the original lease of 1746, whereby the legal estate in the entire of the lands of Shanacool became vested in them. They had three sons and two daughters issue of their marriage: William Bayly, the consor of the judgment in the petition mentioned, was the eldest son; and the respondent Anne Keane, otherwise Bayly, was one of the daughters.

In the year 1803, the said William Bayly married, and, previous thereto, his father and mother, the said Peter and Anne, executed the deed of marriage settlement, in the petition mentioned, bearing date the 24th of December 1803, whereby they appointed or made over to the said William Bayly the one-third part of the lands of Shanacool, which they had previously held in severalty (being the portion of land described in the petition), and which the respondents Keane and wife now by their affidavit submitted was bound in equity by the trusts of the said deed of 18th of April 1786. Anne Bayly, otherwise Everard, never levied any fine to the uses of the said settlement.

The said William Bayly died in the year 1821, intestate, without issue, *and during the lifetime of both his father and mother*; his wife also died many years ago.

The respondents Keane and wife admitted that upon the death of Peter Bayly, who survived the said Anne his wife, they took and since retained possession of the premises in the petition mentioned, and submitted that they were in equity still entitled to retain it, under and by virtue of the deed of the 18th of August 1820 in the petition mentioned (which they alleged to have been executed, although not registered

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in the lifetime of the said William Bayly); whereby, after reciting the said deed of 18th April 1786, and the deed of partition of 6th January 1791, and that the said Peter Bayly and Anne his wife had five children, namely, &c., and that the four elder had been already provided for, they the said Peter and Anne, in pursuance and in execution of the power given to them by the said deed of the 18th of April 1746, and of the trusts thereof, appointed the said third part of the lands of Shanacool so allotted to them by the said deed of the 6th of January 1791, amongst their five children in the proportions following: that is to say, two perches and no more to each of the four elder children, including the said William Bayly, and to their respective heirs and assigns for ever, free and discharged of all rent; and the residue of the said one-third part, subject to the one-third part of the head-rent and renewal fines, to their youngest daughter the said Maryanne Keane otherwise Bayly, for her life; and, after her decease, to such of her children, and in such shares and proportions as she by deed or will should appoint; and, in default of appointment, to such of the said children as should be living at the death of the said Maryanne Keane, share and share alike, to hold to them and their heirs as tenants in common.

The said respondents further submitted, that the said William Bayly having died in the lifetime of both his parents, never was an object of the trusts of the said deed of the 18th of April 1786, and never was or could have been entitled to any part of Shanacool; and that his marriage settlement, if operative, was a fraud upon the trusts of the said prior deeds, and could not have given to him any beneficial estate in the said lands, except in so far as the life interest of the said Peter Bayly may have been thereby affected. They further stated, that inasmuch as no fine was levied by Anne Bayly, otherwise Everard, to the uses of the said marriage settlement, they, being under the belief that the same was altogether fraudulent and void, filed such plea as in the petition mentioned, and they admitted that on the trial there was a verdict against them; but they said that the point saved, and subsequently argued, was merely as to the question whether the legal estate in the lands passed under the said marriage settlement to the said William Bayly; and that, as it appeared to the Court, that previous to the said settlement, the said Peter Bayly and wife obtained the said renewal lease whereby they acquired the legal estate in the lands; and also, that the said Peter Bayly had survived the said Anne his wife, the point saved was ruled in favour of the petitioner. But they further submitted, that even if the legal estate did pass under the said settlement, the said William Bayly or his heir-at-law should be considered merely as a trustee for them, and not entitled to any beneficial interest subject to the judgment debts of the said William Bayly, and that the petition ought therefore to be dismissed with costs.

Mr. *Scott*, Q. C., for the respondents Keane and wife, submitted that the one-third part of the lands of Shanacool allotted to Peter Bayly and wife under the deed of 6th January 1791 was clearly bound in equity by the trusts of the prior deed of 18th of April 1786, and supposing, in the events which had happened, that William Bayly, the conusor of the judgment, took the legal estate in the lands under his marriage settlement, he was in equity a mere trustee, and his creditor had no right to proceed against the lands.

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Mr. *Brewster*, Q. C., for the petitioner, insisted that he had a clear legal title to the possession, and that the equity raised upon the other side was by no means clear. The title to the lands is derived through Anne Bayly otherwise Everard, who married without a settlement, and never levied any fine to the uses of the post-nuptial deed of 18th April 1786, on which the respondents, Keane and wife, ground their defence. Peter Bayly the husband of Anne Bayly, otherwise Everard, was entitled to the substantial interest in the lands, of which he acquired the legal estate by the renewal lease of 1801, and survived his wife. Therefore, both the legal estate and beneficial interest in the lands were passed to William Bayly, the conusor of the judgment under his marriage settlement, to which his father and mother, the said Peter and Anne Bayly, were the granting parties for full and valuable consideration.

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In this case, the petitioner being a judgment creditor of William Bayly deceased, and entitled at law to issue an *elegit* and extend the lands in the petition mentioned, seeks the appointment of a receiver over those lands for payment of the sum due upon the judgment, pursuant to the provisions of the 5 & 6 W. 4, c. 55. A conditional order for a receiver having been obtained, the respondents Mr. and Mrs. Keane have come in to shew cause against its being made absolute; and, having in their affidavit set forth a statement of title, submit that William Bayly, the conusor of the judgment, should be considered as having taken the estate as a mere trustee for them; and, therefore, that they should not be disturbed in the possession of the lands, which they appear to have held for a considerable period. In consequence of the view which I have taken of this case, I think it unnecessary to enter minutely into the statement of title in the affidavit; but I am strongly inclined to think that upon a bill filed by Mr. and Mrs. Keane, making the case now put forward by them, they should be entitled to a decree; and, unless my memory errs, the case of *Ashe v. Lowe* (a), which was decided by the Court of Exchequer in this country, and also the case of *Milner v. Lord Harewood*

(a) 1 Law Rec. N. S. 145.

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in 17th *Vesey*, will be found to be authorities in their favour. But should I now summarily adjudicate upon this equitable defence, and say that the cause shewn shall be allowed?—I think not. The act of Parliament entitles the judgment creditor to have a receiver appointed in every case in which he might at law issue an *elegit* and extend the lands. The petitioner now before the Court has an unquestionable title at law, and if, instead of coming to this Court for a receiver under the Sheriffs' Act, he had issued an *elegit* and proceeded to have execution at law, he could be restrained, if at all, only by the interference of a Court of Equity upon a bill filed for that purpose. I am, therefore, of opinion that where the petitioner has a clear legal title, matter of equitable defence ought not to be admitted as cause against the appointment of a receiver under this act, even though the Court may have little doubt of its sufficiency when rendered operative by a regular proceeding. I must disallow the cause shewn and make the conditional order for a receiver absolute; but Mr. and Mrs. Keane may rest satisfied that the Court will not pay out any part of the fund until they shall have had full time to have their equitable rights established by a decree.*

* A judgment creditor seeking a receiver under the 5 & 6 W. 4, c. 55, must shew a clear title to go into possession: in general, a strict legal title is required, but in some cases an equitable title is sufficient: in either case, the title whether legal or equitable must be clear; otherwise, the Court will not appoint a receiver. Where the legal title is indisputable, and matter of equitable defence is set up against it, as in the principal case, this Court will not summarily adjudicate upon the alleged equity, but appoint the receiver. The Exchequer practice seems to be different in this respect: *O'Brien v. Millet*, 5 Law Rec. N. S. 30. In the class of cases in which a receiver will be appointed under this act on the *equitable* title of the judgment creditor (as where the judgment attached upon an equity of redemption only), the equity must be unquestionable: *Chapman v. Dunbar*, ante 202. See also the cases of *Smith v. Egan*, S. & Sc. 238; 5 Law Rec. N. S. 247: *Kennedy v. Whitney*, S. & Sc. 375; *Tredennick v. Graydon*, 1 Dr. & W. 316. But although the Court will not in general adjudicate upon disputed questions of title on receiver-motions under this act, there appears to be at least one case of exception which may frequently arise; namely, where a receiver has been appointed over the possession of the judgment debtor, and the latter dies before the judgment is satisfied: the question as to his *estate*—i. e., whether he was entitled to any greater estate than for his life only—if disputed, the Court will decide on the motion for continuance or discharge of the receiver: *Brennan v. Fitzmaurice*, 2 Ir. Eq. R. 113: or, if the question be so circumstanced, that the Court could not properly decide it on motion, it seems that, in such case, the receiver should be discharged, the petitioner having neither a clear legal nor equitable title to have him continued: *ibid.*

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ELIZABETH COSGRAVE, *Petitioner*;JAMES GANNON, . *Respondent*.April 28.
May 12.

THE petition in this matter was for a receiver under the Mortgage Act (11 & 12 G. 3, c. 10), and stated that James Gannon, formerly of the town of Kilcock in the county of Kildare, deceased, being in and previously to the year 1827 seized of a freehold estate in certain premises in the said town, and known by the name of the New Lots, under a lease of the 16th February 1797 from Thomas Wogan Browne, Esq., for lives renewable for ever, by deed of mortgage of the 9th of November 1827, between the said James Gannon of the one part, and Patrick Cosgrave since deceased (petitioner's late husband) of the other part, after reciting the said James Gannon's possession under the said lease, and that he was then fairly indebted to the said Patrick Cosgrave in the sum of £50, granted, bargained, sold, released and confirmed all that and those the said demised premises, containing thirty-four perches seven-tenths, known by the name of the New Lots, and situate, &c., to hold to the said Patrick Cosgrave, his executors, administrators and assigns, together with the said lease of the 16th of February 1797, to the only use and behoof of the said Patrick Cosgrave, his executors, administrators and assigns for ever; subject to redemption on repayment of the said sum of £50 on the 1st of May 1828, with legal interest from the date of the said indenture, and of such other sums, not exceeding in the whole £100, as the said Patrick Cosgrave might thereafter lend or advance to or for the use of the said James Gannon at his request. That the said indenture contained a covenant that the said James Gannon, his executors or administrators, should well and truly pay to the said Cosgrave, his executors, &c., the said sum of £50, with legal interest, and all such further sums not exceeding £100, as he should advance: that this deed was duly registered on the 31st of March 1828.

That the said James Gannon died in or about the month of April 1828, leaving a widow and several children, having previously thereto made his will, whereby he devised all his freehold property held by lease from Thomas Wogan Browne (being the mortgaged premises) to his second son James Gannon (the respondent); that the said will was and

As cause against a conditional order for the appointment of a receiver under the Mortgage Act (11 & 12 G. 3, c. 10), the respondent impeached the mortgage, and shewed, by affidavits of himself and of other persons, very strong grounds to induce the Court to believe it was obtained without good consideration and by fraud. The cause was allowed without costs,—it having been the practice hitherto not to appoint a receiver under the Mortgage Act, except where the right of the mortgagee was uncontroverted; and it appearing by the petition in this case that from the date of the mortgage to the present time (a period of thirteen years), no payment had been made—or demanded, as the respondent

alleged—on foot of the mortgage, although the parties were close neighbours all the time. But the Master of the Rolls declared it should not be understood that petitions under this act may be defeated whenever the respondent comes in on motion and impeaches the mortgage; that for the future the conditional order for a receiver shall be made absolute notwithstanding such impeachment, unless the grounds for such impeachment clearly appear; and that the former practice held out a strong temptation to parties in receipt of the rents to make improper statements upon oath, and ought not to be followed.

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still continued to be lodged in the Consistorial Court of the diocese of Kildare, but had not been proved, nor had administration been granted, as the petitioner believed. But that immediately after the said mortgagor's death, the respondent entered into and from thence continued, and still was in the possession and receipt of the rents and profits of the mortgaged premises.

That Patrick Cosgrave died on the 2nd of September 1839, having previously made his will, bearing date the 19th of August 1839, whereby he gave and bequeathed to the petitioner all his right, title and interest in the town of Kilcock, known by the name of the New Lots, as mortgaged to him by James Gannon; that the petitioner had obtained letters of administration of his effects with the will annexed; and that the said sum of £50 secured by the said mortgage was never paid by the said mortgagor nor by any other person on his behalf, and the same with legal interest thereon from the date of the deed, making altogether the sum of £89, was justly due and owing to the petitioner as such administratrix and devisee.

That the mortgaged premises were now set to several persons and produced the gross yearly rent of £14. 1s., and were subject to the yearly head rent of £10 of the late currency, or £9. 4s. 7d. of the present currency. That on the said premises there was one house unset, and another in the occupation of the respondent, which if now let would produce the yearly rent of £30 or thereabouts. That the respondent allowed a large arrear of the said head rent amounting in the whole to upwards of £100, as petitioner believed, to grow due upon the said premises, and that the same were, therefore, a scanty and precarious security for the sum due for principal and interest on foot of the said mortgage.

The foregoing petition was presented on the 25th of January 1841, and on the following day the petitioner obtained, as of course, a conditional order for the appointment of a receiver.

April 28.

A motion was now made on behalf of the respondent to shew cause why the said conditional order should not be made absolute. The application was grounded upon affidavits made by the respondent, and his brother Thomas Gannon, and one Michael Bonyng.

The respondent's affidavit stated, that his father died on the 27th of March 1828, and admitted that he died possessed of the houses and premises called the New Lots under the lease of 1797, in the petition mentioned, having expended, as deponent had heard and believed, a sum of about £1400 in building and rebuilding the houses on the said premises. That for about two years previous to his death, the said James Gannon deceased was very much in the habit of drinking spirits and other strong liquors, and was constantly in the company of one Michael Mullowney, who frequented the public house then kept by the said Patrick

Cosgrave deceased in the said town of Kilcock ; and that the said James Gannon became entirely negligent and careless of his business, and innocent, insomuch that previous to his death he left his own house and family, and died in the house of one Thomas Parker since deceased, who then lived in said town.

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That deponent knew not whether his said father had executed the deed of mortgage in the petition mentioned, and never was apprised of the same until he read the petitioner's affidavit. That at the time when the said alleged mortgage purported to have been made, the said James Gannon was not competent to do any valid act from his weakness and imbecility of mind ; and if he did execute such deed, he was induced to do so by the said Patrick Cosgrave, who was an intelligent designing man and likely to take advantage of the said James Gannon's weakness and innocence while in a state of intoxication.

That deponent believed the said James Gannon did not borrow any money from, nor was in any manner indebted to, the said Patrick Cosgrave, save that it might be for liquor supplied to him by the said Patrick Cosgrave ; but deponent admitted he had heard that the said Patrick Cosgrave obtained a bond from the said James Gannon, and also possession of the head lease of the said premises by artifice or imposition on the said James Gannon.

That although the said Patrick Cosgrave was in very poor circumstances for the last three years of his life, no demand was made by him on this deponent, nor, as he believed, on any of deponent's family, for principal or interest on said alleged mortgage ; and if ever the said mortgage deed was executed by the said James Gannon deceased, it was when he was not sober or in a proper state of mind to execute such deed ; and deponent submitted that the same was not a legal and *bonâ fide* deed, but fraudulent and fabricated.

Deponent admitted that he had entered into and still was in possession of the said premises ; and that the said sum of £50 in the petition mentioned, had never been paid, nor any interest thereon ; but that the same, as he believed, was not fairly or legally due.

That it was not true, that the gross annual rent payable out of the said premises amounted only to the sum of £14. 1s. ; that they amounted to £30 sterling, besides the houses then unset ; and deponent admitted that the yearly head-rent was £9. 4s. 7d. present currency, but said it was untrue that he had allowed upwards of £100 arrears of the said head-rent to grow due on the said premises—that on the contrary there was only about £20. 9s. 2d. so in arrear.

The affidavit of Thomas Gannon stated that he was son of James Gannon deceased, and half brother of the respondent, and had lived for the last twenty years in the town of Kilcock, but never heard, until after

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the petition in this matter had been presented, of the mortgage therein mentioned. That the said James Gannon for two or three years previous to his death was almost continually in a state of intoxication, and that in consequence of the excessive use of ardent spirits, he was at the date of the alleged mortgage quite simple, and incapable of understanding its purport or effect. That he was in the habit of frequenting and drinking in the said Cosgrave's public house in company with the said Cosgrave and one Michael Mallowney, who appeared by the memorial of the said alleged mortgage to have been an attesting witness thereto; and that the said Cosgrave and Mallowney could make the said James Gannon do what they pleased.

Michael Bonyng's affidavit stated that the deponent was for many years well acquainted with the respondent's father J. Gannon and the said Cosgrave and Mallowney, all of whom were in the habit of drinking together in Cosgrave's public house; that by excessive indulgence in strong liquors the said James Gannon had become, for some time previous to his death, imbecile in his mind and totally incompetent to manage his affairs; and that deponent knew it to be the fact that the said Cosgrave, who was a shrewd man, and Mallowney were in the habit of making a dupe of the said James Gannon, and particularly when they got him in a state of intoxication,—“tossing with him for rounds of punch or other drink, and “whether the said James Gannon won or lost, the said Cosgrave and Mallowney persuaded him he had lost and charged such reckonings or alleged “losses to his account.” That deponent had known the said James Gannon to be drunk for several days together in Cosgrave's public-house, and to sign orders for money for which he had not received any value. That Cosgrave was, for some years previous to his death, in very reduced circumstances.

Mr. *H. G. Hughes*, for the respondent, submitted, upon the facts disclosed by the foregoing affidavits, that the mortgage in this case was impeached upon almost every ground by which a contract could be vitiated; and that it had been decided in several cases that the Court will not summarily appoint a receiver under the Mortgage Act, where the mortgage is impeached: *Leahy v. Arthure* (a); *Darcy v. Blake* (b). In the case of *Chamley v. O'Brien* (c), Sir Edward Sugden first, and the Court of Exchequer afterwards refused to appoint a receiver under the Mortgage Act, the mortgage being impeached.

Mr. *Monahan*, Q. C., for the plaintiff, said he could not deny that in cases of petition under the Mortgage Act, the Court had always

(a) 1 Hog. 92.

(b) 1 Mol. 274.

(c) Stated in the judgment of the Master of the Rolls; and see the note *post*, p. 440.

refused to appoint a receiver where the mortgage was impeached; and that he therefore thought the cause now shewn against making the conditional order absolute could not be resisted; but as the respondent had not asked costs by his notice, if the Court would allow the cause, it should be without costs: *Little v. Johnson* (a); *McNamara v. Church* (b); *Magrath v. Veitch* (c).

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I will not say what may have been the *practice*, but I doubt that it has ever been solemnly decided that the Court will not appoint a receiver on petition of a mortgagee, simply because the mortgagor or those deriving under him, and in receipt of the rents, think proper to come in on motion and impeach the mortgage, by way of shewing cause against the conditional order for appointment of a receiver. Certainly, on petitions under the Sheriffs' Act, between which and the present there is a close analogy, the Court has never sanctioned any such rule as that contended for in this case; on the contrary, the Court has uniformly disallowed the mere impeachment of the security on motion, as any cause against the appointment of a receiver. Sometimes, when the judgment has been impeached on the ground of having been improperly obtained, and it has been alleged that the respondent should have had a good defence at Law—the nature of such defence being shewn, and the probable grounds for it appearing—the receiver-motion has been ordered to stand over, while the question between the parties has been submitted to a summary investigation in the Court of Law, and afterwards this Court has disposed of the matter pursuant to the provisions of the act of Parliament. Again, where the petitioner has shewn a clear legal title to a receiver under the act, but an equitable case has been set up against it, I have appointed the receiver, but retained the fund until the party relying upon the equity had an opportunity of making it effectual by a regular proceeding for the purpose (d). However, I know of nothing in that act, nor in the 11 & 12 G. 3, which could justify me in refusing to give to what upon the face of it appears to be a clear right at Law, the effect which those statutes declare it shall have in this Court; and I am as much at a loss for the reason of the rule contended for, if, turning from the special jurisdiction under the act of Parliament, I look to the proceeding of this Court in the exercise of its general jurisdiction: as, for example, upon a bill filed to raise the arrears of an annuity, in which case it is quite settled that the defendant cannot resist the appointment of a receiver by coming in on the receiver-motion and impeaching the security (e). The

(a) 1 Mol. 234.

(b) 1 Law Rec. N. S. 1.

(c) 1 Mol. 234, n.

(d) See the preceding case.

(e) See *Richards v. Gould*, 1 Mol. 22; *Kelly v. Butler*, 1 Ir. Eq. Rep. 435; *George v. Evans*, 4 Y. & Col. 211.

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appointment of a receiver is *in usum jus habentis*; and if upon the one hand, the party against whom the receiver is appointed may complain of being so disturbed by means of a demand afterwards ascertained to be fraudulent; on the other, it is to be remembered that it is the duty of such party to take proceedings to avoid that fraud to which his own neglect or oversight has probably been an accessory; and if, instead of doing so, he chooses to leave an apparently clear legal title outstanding against him, until this Court is asked upon such title to appoint a receiver and put him out of possession, he has no reason to complain if the Court will regard the apparently clear legal title, and not listen on a receiver-motion to matter of impeachment, which, if at all available, should be the subject of a bill.

In the present case, if the petitioner pleases it, I can have no objection to say, "Mr. Monahan, of Counsel with the petitioner in open Court so *consenting*, allow the cause shewn, and discharge the conditional order "for appointment of a receiver."—[Mr. *Monahan* here declined being party to any such consent, and desired to be distinctly understood as resisting the motion.]—If, then, I am required to decide whether the cause shewn should be allowed, I must look into the documents, and examine the authorities upon the subject; but my present opinion is strongly against the practice which has been referred to. I know of nothing in the act of Parliament to justify it, and I should require much argument to induce me to sanction or follow it. In my opinion, it holds out a temptation—and what would be in many cases a too-powerful and severe temptation—to persons in pecuniary difficulty, to state upon their oaths that which they ought not to state, where by so doing they may hope to retain, at least for some little time longer, a possession to which their creditors are rightfully entitled. I shall, however, read the affidavits and look into the authorities, before I make any order in the case.

May 12.

MASTER OF THE ROLLS.

In this case, a petition having been presented under the Mortgage Act, praying the appointment of a receiver over certain premises comprised in the deed of mortgage set out in the petition, and a conditional order for a receiver having been obtained, the respondent (who, it seems, is entitled as devisee of the mortgagor, and in possession of the premises) comes in, and, by way of shewing cause against the order for a receiver, impeaches the mortgage as having been obtained without valuable consideration and by fraud.

It is said that the 11 & 12 G. 3, c. 10, does not apply to any case in which the mortgage is impeached, and some decisions have been referred to as authorities for that proposition. In the case of *Leahy v. Arthur*^(a),

(a) 1 Hog. 92.

which was a motion for a receiver on petition under the Mortgage Act, by a person who had only an equitable assignment of the mortgage, without having paid any valuable consideration for it, the late Master of the Rolls decided, that "as the petitioner was only a trustee for the mortgagee the application should be refused with costs;"—and having so decided, he is reported to have gone on and said, "that as the mortgage was impeached, it could be enforced only in a Court of Equity by bill; and that such was not a case within the statute, which applied only where the mortgage was uncontroverted." I must say, that I have looked very carefully through the act of Parliament, and that I have not been able to discover in it any thing which should limit its application to those cases only in which the mortgage is uncontroverted; and in my judgment the Court should hesitate long before it would adopt such a construction of this or any other statute, as would have the necessary effect of leaving its intention liable to be defeated in every case, and of holding out, whenever a receiver is sought for, an inducement to the persons in possession to come in with rash attempts to impeach the security, whether there be any grounds for impeaching it or not. But whatever may have been the doctrine of the late Master of the Rolls upon this subject, it is plain that it was totally distinct from the ground of his decision in *Leahy v. Arthure*, which was—that the petitioner had not a legal title and was only a trustee. It, therefore, cannot be considered as a decision in support of the doctrine which has been contended for on the present motion.

In *Darcy v. Blake* (a), Sir Anthony Hart is reported to have used similar language as to the limited application of the Mortgage Act, to that attributed to the late Master of the Rolls in the report of *Leahy v. Arthure*; and it must be admitted that the case before Sir Anthony Hart as reported, affords an express decision, and more than a *dictum*, upon the subject. It is stated to have been before the Court on the 26th of February 1829; but I am informed that no trace of the order nor of the petition in that case can now be found, although I directed the strictest search to be made for them. Supposing, however, the doctrine held by Sir Anthony Hart to have been as stated by the Reporter, it cannot with propriety be said to have universally prevailed. In *Shepherd v. Murdock* (b), the plaintiff filed a bill to foreclose a mortgage of very old date, without stating that any interest was ever paid. The defendant answered, alleging that he did not know whether the encumbrance was paid or not, and therefore could not admit it to be due. The plaintiff then presented a petition under the Mortgage Act, and having got a conditional order for a receiver, the defendant came in to shew cause against it upon an affidavit to the same effect as his previous answer. There, Lord Manners

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(a) 1 Mol. 274.

(b) 2 Mol. 531.

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disallowed the cause and granted the receiver. He is reported to have said, "If the validity of the security is impeached upon probable grounds, "or from length of time, or other circumstances, it should be presumed "to be paid off: these, in my opinion, would be cases in which the Court "would not in this summary way, under the Mortgage Act, appoint a "receiver." With those observations I concur: I admit that wherever by reason of *laches* or other circumstances the petitioner has not a clear *prima facie* right to go into possession, a receiver ought not to be summarily appointed under the Mortgage Act; but the case just mentioned shews that, in Lord Manners' opinion, the grounds which should induce the Court to refuse a receiver must be very strong: for there, the receiver was appointed, although the mortgage was nearly forty years old, and it was not stated that there had ever been any payment upon foot of it.

A decision of Lord Chancellor Sugden, in *Chamley v. O'Brien*, and a subsequent decision of the Court of Exchequer on the same subject and between the same parties, have been referred to as authorities for the rule contended for on behalf of the present respondent, but, in my opinion, they cannot be so considered. The papers in that case have been furnished to me, and I find that the mortgage in question bore date the 17th of April 1794, and that the petitioner had instituted a foreclosure suit in the Court of Exchequer in the year 1804, which was still pending when, in January 1835, he applied to the Court of Chancery, on petition, for a receiver under the Mortgage Act. There was not in that case any thing like an impeachment of the mortgage; but it may have been reasonably expected that the Chancellor would say to the petitioner, "You have a foreclosure suit pending in the Exchequer: you should "therefore have applied to that Court, and not have come here." That such was the ground upon which Sir Edward Sugden refused the receiver, and not, as supposed, because of any impeachment of the mortgage, is plain from the order in the case, which bears date the 24th of January 1835, and is in the following words:—"Mr. Attorney-General "moves for the appointment of a receiver pursuant to the prayer of the "petition: Mr. Jackson, for the respondent, shews cause *that there is a "suit pending in the Court of Exchequer, at the petitioner's suit, to "foreclose the mortgage.* LORD CHANCELLOR.—Allow the cause shewn, with costs."*

The petition in Chancery having thus failed, Chamley filed another

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Chancery.
 Jan. 24.

* The following note of the case has been kindly furnished to the Reporter by Mr. FRANCIS GOOLD:—

CHAMLEY, Petitioner; O'BRIEN, Respondent.

THIS was a petition for a receiver under the Mortgage Act, 11 & 12 G. 3. In 1794, D. O'Brien mortgaged certain premises to J. Chamley, and the mortgage had become

petition some time in August 1837, in the Court of Exchequer, stating his previous application to the Chancellor, and that it was refused, because of the suit pending in the Exchequer. The cause shewn in the following Michaelmas Term was, that the respondent (who was son of the mortgagor, and claimed to be entitled to an estate for life in the lands under a marriage settlement executed in the year 1796, nearly two years after the date of the mortgage) had been left by the petitioner in the undisputed possession of the lands from the year 1796 until the year 1829—a period of thirty-three years; that, in 1819, Chamley obtained an order in the foreclosure cause, instituted in 1804, for the appointment of a receiver, but without notice to the respondent, who, although in possession, had not up to that time been made a party; that, no proceeding under this order was taken to alter the possession, until February 1829, when an order was obtained to renew the order of February 1819, with neither of which orders was the respondent served; that when the receiver, then appointed, proceeded to interfere, the respondent immediately gave Chamley notice of the irregularity of his proceeding; and Chamley having promised, but delayed, to sign a consent for the discharge of the receiver, the respondent, on the 9th of February 1832, applied to the Court, and upon the case then made, obtained an order for the removal of the receiver, and thenceforward continued in undisturbed possession of the lands. Such was in substance the cause shewn, and allowed by the Court of Exchequer. I am not informed as to the precise ground upon which the cause was allowed; but it is obvious that whatever was the ground, it certainly was not that the mortgage was impeached. Sir Edward Sugden refused the receiver because the petitioner had a foreclosure bill pending in the Exchequer; and there can be no doubt that the latter Court also refused to appoint a receiver on petition, not only because of the pending suit in which the petitioner may have applied, but also because of his gross *laches*,

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vested in the petitioner. In 1793, D. O'Brien purchased the head-rents to which the premises in the mortgage of 1794 had previously been subject. More than one and a-half year's interest being in arrear, the petitioner now sought a receiver—the premises, except the head-rents purchased in 1793, being subject to prior mortgages.

Mr. Jackson resisted the application, upon the ground that the petitioner had instituted a suit upon foot of the same mortgage in the Court of Exchequer; and that, except in a plain case, the Court would not grant a receiver in this summary way.

Attorney-General, for the petitioner.—The suit in the Court of Exchequer has abated, and has never been revived.

LORD CHANCELLOR SUGDEN.

There being a foreclosure suit pending in the Exchequer, it would be impossible for this Court to interfere in the summary way sought by the petitioner. The petition, therefore, must be dismissed with costs.

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and of his irregular attempt to have a receiver appointed in the cause, behind the back and without notice to the party who must have been known to be in possession.

In the cases last mentioned, the receiver was refused upon the general principles alluded to by Lord Manners, but not upon the ground that the mortgage was impeached. However, I have not met with any reported case under the Mortgage Act, in which a receiver was appointed notwithstanding the impeachment of the original transaction of the mortgage; and I believe that the practice has been not to appoint a receiver in such a case, although I think such practice was not warranted by principle, nor founded upon any very distinct authority. It was probably an effect of the doctrine formerly entertained respecting the appointment of receivers in mortgage causes—that a receiver could not be appointed except upon the defendant's admission of the mortgage and of an arrear of interest due. But that has long since been exploded. In *Crowe v. Halliday* (a), which was a foreclosure suit in which a large sum was stated to be due, the mortgagor, who had only a life estate, by his answer denied the justice and legality of the mortgage. The plaintiff having prayed the appointment of a receiver, obtained on motion a conditional order for that purpose; against which the defendant came in to shew cause, relying upon his answer, and alleging amongst other things, that the sum stated in the mortgage deed as the consideration for it was a merely nominal sum, and that the mortgage had been made for his own purposes. The Court of Exchequer disallowed the cause, and granted the receiver. Crowe, the mortgagor, appealed against this order to the House of Lords, where it was decided that under the circumstances, "it was equitable and just that *for the preservation of the fund, and for the safety of all interested parties*, a receiver should be appointed." The order of the Court of Exchequer was accordingly affirmed, and the appellant ordered to pay £100 costs.

I think there should not be any such rule as that contended for in this case: it holds out to the person in receipt of the rents a temptation to rash swearing, and to frivolous and vexatious litigation: it certainly is a rule to which I will not give any sanction; and I desire it to be generally understood, for the future, that petitions under this act are not as of course to be defeated in every case in which the respondent thinks proper to come in and allege that the mortgage is fraudulent and without the consideration for which it purports to have been made. But finding that the practice has been otherwise; and finding also that, independently of the special grounds upon which the mortgage in this case is impeached, it appears that there has been no demand of interest or principal ever since it was made (now thirteen years), although the parties have been constantly resident in the same village, I do not think that this is a case in which

(a) 2 Ridgw. P. C. 58.

I ought to make a precedent by appointing a receiver. Therefore, declaring it to be my opinion that the mere impeachment of a mortgage, without shewing the probable grounds for such impeachment, should not prevent the Court from appointing a receiver under the Mortgage Act; and that the better course is to secure the fund *in usum jus habentis*, the present order of the Court is,

Allow the cause, without costs.

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JOSEPH GLENNY, and others; Plaintiffs.
FRANCES MURDOCK, CAROLINE MORGAN and others; Defendants.

THIS was a motion, after decree in a foreclosure suit, for liberty to withdraw a disclaimer and amend the answer, or to file a supplemental answer, stating the defendant's title to any surplus which might remain after payment of the plaintiff's demand, under the circumstances which are detailed in the judgment of the Master of the Rolls.

Mr. William Brooke, Q. C., and Mr. Lewis Morgan, for the motion, cited the following authorities: *Countess of Gainsborough v. Gifford* (a); *Dagly v. Crump* (b); *Nail v. Punter* (c); *Frankland v. Overend* (d); *Napier v. Staples* (e); *Shaw v. Murtagh* (f).

Mr. Andrews, for the plaintiffs, appeared on the motion, and did not object to it.

MASTER OF THE ROLLS.

In this case, after a decree to an account has been obtained in a foreclosure suit, an application is made on behalf of Mrs. Caroline Morgan, one of the defendants, for liberty to withdraw a disclaimer filed by her, and amend her answer, or file a supplemental answer, in order to state her rights as one of the co-heiresses of the mortgagor, to a portion of any surplus funds which may remain in this cause after satisfying the demands

In a foreclosure suit, a party, who was made a defendant as one of the co-heiresses of the mortgagor, filed a disclaimer by mistake, and in ignorance of her rights; and after a decree to account had been obtained, moved for liberty to withdraw the disclaimer and file a supplemental answer stating her lately discovered title to the surplus after payment of the plaintiff's demand. The motion was refused, upon the ground that it would be impossible to put the plaintiff in

the same situation as he would have been in, if the defence had been stated on the record in due time; but without prejudice to such further application as the defendant might make for the purpose of establishing her claim to a share of the surplus, if any, after satisfying the demands under the decree.

(a) 2 P. Wms. 424.

(c) 4 Sim. 474.

(e) 3 Law Rec., O. S., 337.

(b) Dick. 35.

(d) 9 Sim. 365.

(f) 3 Law Rec., N. S. 71.

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under the decree. She does not seek in any manner to disturb the decree or prejudice the rights under it, but only that her own rights, in case of a surplus, may not be prejudiced by her disclaimer.

For the purpose of the motion, this lady has made an affidavit, in which she states that she and her sister were made defendants in this cause as co-heiresses of their nephew George Gordon Murdock, one of the mortgagors in the bill mentioned; and that when served with the subpoena to appear and answer, she, being wholly ignorant of law matters, sent for her solicitor to advise her as to what she was to do, and shewed him the will of her father, George Gordon, with which she had been furnished shortly after his death in 1824, whereby he had affected to devise away all his property including the lands in the pleadings mentioned, and as she believed, with full power and right to do so. That upon reading the will, her solicitor was of opinion she had no interest whatever in the lands, and was merely a formal party, and therefore advised her, for the purpose of avoiding expense, to file a disclaimer, which was accordingly filed.

She further states, that she was married in the year 1799, at the early age of fifteen, when she left the residence of her father, and ever since lived at a distance from it: that for fourteen years preceding her father's death, she had not been in his house, and never knew any thing of her father's title to his estates, or of the law affairs of himself or of his grandson George G. Murdock, but fully believed her father had power to dispose of the property as he had done by his will; and finding that no part of it had been devised to her, she believed she had no interest in it, and made no further inquiry upon the subject.

That after the disclaimer was filed, she heard no more of this cause until some time in the course of this year, when she heard accidentally that notwithstanding her father's will she had an interest in the property; in consequence of which she caused her solicitor to make further inquiry, the result of which was the discovery of certain deeds by which it appears that her father was only tenant for life, and that upon the death of their nephew, George Gordon Murdock, intestate and without issue, she and her sister as his co-heiresses became entitled to the equity of redemption in the mortgaged premises; and that Mr. Warren's opinion to this effect was obtained on the 28th of April last—only two days before the decree to account was pronounced.

The plaintiffs have appeared upon the motion, and do not object to it, as Mrs. Morgan only seeks permission to put forward her claim to the surplus which may remain after satisfying their demands. I have no doubt that the disclaimer was filed by mistake and in ignorance of this lady's right; but, how can I make an order giving liberty to file a supplemental answer after a decree has been obtained?

According to the old practice, the amendment of an answer has been permitted after a decree to an account: in the case of the *Countess of Gainsborough v. Gifford* (a), a mistake having occurred in the engrossment, leave was given to amend the answer and swear it over again. But, under the present practice, great difficulty must arise if a supplemental answer were permitted after a decree. What should be done with such an answer? Should the plaintiff reply, and go to another hearing after he has got his decree? In *McDougal v. Purrier* (b), Lord Eldon refused leave to file a supplemental answer—saying, it would be impossible to put the plaintiff in the same situation as he should have been in, if the defence had been stated upon the record in due time. In the present case,—after witnesses have been examined, and the cause heard, and a decree obtained,—if I should now give liberty to file a supplemental answer, how could I put the plaintiff in the same situation as he should have been in, if such defence had been made before issue was joined in the cause? I think it would be impracticable, and that I must therefore refuse the liberty applied for.

But I very much doubt that this lady's rights stand in such need of a supplemental answer as she seems to suppose. The plaintiffs, whose rights are paramount, have no occasion and are not disposed to bind her by her disclaimer; as between her and them no question can arise; and I do not think that her co-defendants could rely upon it as binding her conclusively. In *Seton v. Slade* (c), the Chancellor says that a defendant cannot get rid of a disclaimer upon record *without* a strong case upon affidavits; and in *Sidden v. Lediard* (d), he says "*In order to get rid of the effects of a disclaimer it is necessary to shew some specific ground supported by special affidavits.*" These cases shew Lord Eldon's opinion to have been, that even as between the defendant disclaiming and the plaintiff, the disclaimer is not absolutely conclusive, as he recognises the possibility of avoiding its effect by a proper case supported by affidavits; and *a fortiori*, it cannot be considered conclusively binding as between co-defendants.

In the case of *French v. Myles* (e), a manifest mistake having occurred in the description of a schedule to an answer, whereby the accounts should have been taken in a manner most disadvantageous to the party filing the answer, the Vice-Chancellor allowed supplemental schedules to be filed, and the party to have the benefit of them in the office on taking the accounts.

Now in mortgage causes in this country there is always a decree for a

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(a) 2 P. Wms. 246.

(b) 4 Russ. 486.

(c) 7 Ves. 267.

(d) 1 Russ. & My. 110.

(e) 4 Madd. 404.

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sale and not a mere foreclosure as in England, and part of the reference always is to ascertain the persons entitled to the surplus. I think that according to the principle of the decisions I have mentioned, Mrs. Morgan's disclaimer cannot be treated as binding her conclusively, and that she may hereafter obtain leave to file a charge in the office, claiming a portion of the surplus fund notwithstanding the disclaimer. In this way, without adopting an expedient which might be mischievous as a precedent, we may be enabled to effect the substantial justice of the case, which it is always the desire of the Court to advance, and to relieve as far as possible from the effects of accident or mistake.

ORDER :—No rule on the motion, but without prejudice to such further application as the said defendant Caroline Morgan may make for the purpose of establishing her claim to any portion of the surplus that may remain of the produce of the mortgaged premises in the pleadings mentioned, after satisfying the demands under the decree in this cause.

AVARELL *v.* WADE.

May 13, 18.

In a judgment creditor's suit for administration of assets (the Master having reported that the personal estate was of little value, and a mortgage debt, part thereof, as irrecoverable), the final decree directed a sale of the real

THE bill in this cause was filed by the Rev. Adam Avarell, a judgment creditor of Samuel Wade deceased, on behalf of himself and the other creditors of the said Samuel, against Thomas Wade, who was his heir-at-law, executor and devisee; and prayed an account of the real and personal estate of the deceased, and for an administration of assets. It set forth, amongst other things, the will of Samuel Wade, whereby it appeared that part of his effects was a mortgage debt due to him out of the estate of one De Burgh, on which it was a charge.

In November 1827, there was the usual decree to take an account of

estate for payment of judgment debts, according to priority. There were sixteen judgments; and the produce of the real estate was applied in paying off the three earliest, and the balance was paid towards satisfaction of the fourth. Afterwards the mortgage debt, part of the personal estate, was unexpectedly realised, and the amount having been transferred to the credit of this cause, but being a very deficient fund, the Master allocated it rateably, giving the fourth judgment creditor his rateable share upon the unpaid portion of his demand. The latter insisted that the personal assets should have been administered rateably in the first instance, and, therefore, that a portion of them equivalent to the shares which the three prior creditors ought to have received, should now be allocated as the produce of real estate—not rateably, but according to priority: and having moved to send back the report upon this ground, the Master of the Rolls overruled the objection and confirmed the report—adopting the principle of the decisions in 3 P. Wms. 322–344, n.

the real and personal estate, and of the debts; under which, the Master reported on the 11th of January 1829; and it being supposed and stated at the time of taking the account, that the sum due upon 'De Burgh's mortgage was a bad debt and irrecoverable, the Master reported the fact so to be, and, in effect, that there was little or no available personal property of Samuel Wade. He further found as to the debts, and the particulars of the real estate.

The final decree, pronounced in 1831, directed a sale of Samuel Wade's real estate for payment of his several judgment creditors, as reported, and their costs, *according to priority*.

The real estate was accordingly sold, and produced the sum of £5000.

There were in all sixteen judgment creditors who proved their demands. The first three in priority (of whom the plaintiff Avarell was one) were paid the full amount of their demands, and costs considerably exceeding £1000, out of the produce of the real estate; after which there remained of that fund a balance of £550, which was paid on account of the judgment, fourth in priority, upon which £1600 had been reported due for principal and interest, exclusive of costs.

In the course of the year 1840, the sum of £3000 was unexpectedly realised upon De Burgh's mortgage, in the cause of *Clarke v. De Burgh*, to which the defendant Thomas Wade was a party, as executor of Samuel; and by an order of this Court that sum was transferred to the credit of this cause. By a further order it was referred to the Master to allocate this fund pursuant to the decree, and the Master allocated it according to priority—his attention not having been called to the nature of the fund, and the final decree being for payment according to priority. By such allocation, the whole fund would have been exhausted after payment of the eighth or ninth judgment creditor; but no objection having been taken, the usual application was made to confirm the report, and that the fund should be paid out pursuant to it. Upon that motion, the Master of the Rolls, on looking into the papers, and perceiving the quality of the fund, sent back the report to be reviewed by the Master, having regard to the fact that the fund to be allocated was part of the personal estate. Whereupon the Master reviewed his report, and by his further report of the 3rd of May 1841, allocated the fund rateably towards payment of the sums due upon the fourth, and several subsequent judgments.

A motion was now made, on behalf of the party having the carriage of the decree, that the Master's report, bearing date the 3rd of May instant, should stand confirmed, and that the fund should be allocated accordingly. At the same time there was a cross-motion on the part of one Kelly and his family, who were entitled in certain proportions to the sum due upon the fourth judgment, that the Master might be directed to review his report, having regard to the fact that the first three judg-

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ment creditors were paid the entire amount of their demands out of the produce of the real estate; and that he might be directed to marshal and allocate the present fund so as that the several judgment creditors entitled under the decree might now be placed in the same situation as if the personal assets had been administered in the first instance. And in the event of the Court being of opinion that a further order or decree would be necessary to have the assets marshalled as sought by the Kellys, their notice stated that their Counsel should apply to impound the whole fund, until such further order or decree could be obtained; they undertaking to proceed forthwith.

Mr. *Manahan*, Q. C., for James William O'Fallon, the party having the carriage of the decree, moved to confirm the report.*

Mr. *Keatinge*, Q. C., and Mr. *Walter Bourke*, for the Kellys.— Under the decree to account, the Master reported that the debt due out of De Burgh's estate was irrecoverable, and that there was in fact no available personal property of Samuel Wade. The final decree proceeding upon that report was framed as if there was no personal property, and directed a sale of the real estate for payment of the judgment creditors according to priority. The Master was mistaken as to the matter of fact: he should have reported that there was personal property to an amount nearly equal in value to the real estate. Had the report been so, there can be no doubt that the final decree, when directing payment of debts, must have had regard to the two different kinds of fund to be administered. It was after the final decree was pronounced that the Kellys obtained leave to go in before the Master and prove their demands; they were not in the office upon the taking of the accounts under the decree, nor parties to the mistake in the report, and should not be made to suffer for it. Had the funds in this cause been applied according to the settled rules of administration, the personal estate should in the first instance have been paid rateably to all the judgment creditors; the three prior creditors should have had their shares of it, and been paid only the residue of their demands out of the fund secondarily liable. Although, in the present case, it has happened by accident and mistake that the secondary fund has been applied in the first instance, the Court often directs that to be done; because, as observed by Lord Eldon in *Lloyd v. Johns* (a), it can afterwards set all right when allocating the primary

(a) 9 Ves. 65-6.

* O'Fallon, although having the carriage of the decree and moving to confirm the report, was in the same interest with Mr. Keatinge's clients, being the assignee of one of the Kellys, who was an insolvent.

fund. That is all we ask the Court to do in this case. The effect would be, that a portion of the present fund, equivalent to the shares which the three prior creditors should have received out of it, should now be treated as part of the produce of the real estate; and allocated to us, as next in priority, together with our share of the personal assets. Our demand should thus be entirely paid. But, according to the Master's allocation, instead of being paid in full the sum due to us, we should get not more than eight or nine shillings in the pound; and the subsequent judgment creditors, whose only fund is the personal assets, are in effect given a portion of the real estate to which they have no claim; and we are deprived of our legal right of priority upon the legal assets. We therefore submit that the report is clearly wrong; *Aldrich v. Cooper* (a); *Gwynne v. Edwards* (b).

Mr. *Charles H. Walker*, for some of the subsequent judgment creditors, replied in support of the original motion.

MASTER OF THE ROLLS.

The bill in this cause was filed by a judgment creditor of Samuel Wade deceased, and, on the 27th of November 1827 the usual decree was made, to take an account of the real and personal estate of the said Samuel and of his debts, &c. In pursuance of this decree, the Master made his report, bearing date the 11th of January 1829, by which he found that the defendant Thomas Wade, as administrator of Samuel, possessed himself of the personal estate of Samuel, consisting of a house and some few other matters of inconsiderable value, and also a mortgage and judgment affecting the estates of a Mr. De Burgh, which were irrecoverable; he also found the particulars of the real estate of Samuel Wade. Founded on this report, a decree was made for a sale of certain portions of the real estate; and for payment of the demands proved under the decree, which consisted of debts secured by judgments against Samuel Wade. The lands were sold; and on the 6th of November 1835, the Master allocated the produce of the sales among the judgment creditors according to the priority of their judgments. The fund was sufficient to pay the plaintiff's demand and his costs, also the demands of the two judgment creditors next in priority, and a portion of the demand of the fourth judgment creditor. There were twelve other judgment creditors who did not get any payment: their demands and the unpaid portion of the demand of the fourth creditor, amount at present to £7791. 5s. 3d.

In some time after the allocation and payment out of Court of the

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(a) 8. Ves. 382.

(b) 2 Russ. 269.

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produce of the real estate, the sum secured by the mortgage on Mr. De Burgh's property was unexpectedly realised, and, under an order of this Court, transferred to the credit of this cause. The Master was directed to allocate it amongst the unpaid creditors; and, he having allocated it to them according to the priority of their respective judgments, the Court, on the 6th of July 1840, sent back the report to be reviewed; and the Master was directed to have regard to the fact that the fund to be allocated, consisted of personal estate only. Under that order he has made a report, distributing the fund rateably among the unpaid creditors: and the present application is made by the owner of the fourth judgment in point of priority proved under the decree, to have this last report reviewed: he contending that the fund should be distributed, as he says it would have been, if the whole of it had been in Court when the first distribution was made, viz., by giving to each of the judgment creditors a rateable proportion of the personal estate in the first instance, and paying them the balance of their demand out of the produce of the real estate according to the priorities of their respective judgments. By thus giving to the plaintiff and the second and third judgment creditors a portion of the personal estate, there would remain a large surplus of the produce of the real estate, which should be applicable to the residue of the fourth judgment creditor's demand, after payment of his rateable proportion of the personal assets.

In support of the application, the case of *Aldrich v. Cooper*, and other cases of that class have been cited, which establish the general rule, that when one creditor has a demand against two estates, and another creditor against one of them only, the creditor who can resort only to one estate for payment of his debt, has a right to make the creditor who can levy his demand out of both, resort in the first instance to the estate which is not liable to both demands; but I apprehend, it will be found that the general rule so established, instead of aiding the present application, would afford good ground for refusing it: for, the plaintiff and the second and third judgment creditors should have had two funds for payment of their demands, if the personal estate had been realised before the distribution of the produce of the real estate was made; and the subsequent judgment creditors might have contended that, according to the rule above referred to, the demands of the plaintiff and the early judgment creditors ought to be thrown on the real estate, so as to leave the personal estate available for the subsequent creditors. I think they should have been entitled to have had such a distribution made of the funds. By making it in that manner, the Court would to some extent carry out the general principle upon which Courts of Equity act; namely, that of making, as nearly as possible, an equal distribution of assets to all the creditors of the deceased. In a note to *The case of the Creditors of Sir Charles*

Cox (a), the decree pronounced is given; by which it was directed that such of the creditors as received any satisfaction out of the legal assets were not to receive any thing towards satisfaction of the remainder of their debt out of the equitable assets, until all the other creditors received out of the equitable assets so much as would make them equal, in proportion to their respective debts, with the creditors who had been paid in part out of the legal assets. The same thing was done in *Morrice v. The Bank of England* (b).

In the present case, the fourth judgment creditor has been permitted to retain what he received out of the real estate, and gets his share of the personal property rateably with the other judgment creditors, whose demands against that fund are equal to his. He has not, in my opinion, any right to quarrel with the distribution that has been made by the Master. If there be any ground of objection to the report, it certainly is not that it gives the fourth judgment creditor too small a portion of the fund: I therefore refuse his application.

ORDER :—The Court doth refuse the motion to send back the report; and it is ordered that the said report do stand confirmed, and accordingly that the Accountant-General, do, &c.*

(a) 3 Cox's P. Wms. 344; see also *Haslewood v. Pope*, 3 P. Wms. 322.

(b) *Cas. temp.* Talb. 220, and 4 Bro. P. C. 287; and see *Shafts v. Powell*, 3 Lev. 356; *Bishop v. Godfrey*, Prec. Ch. 179; 10 Ves. 34; 2 Swst. 576; 19 Ves. 588.

* This order was confirmed on appeal by Lord Chancellor Plunket on Saturday 19th June, 1841.

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SMITH v. SHANNON.

(In Chancery.)

The assignee of a lease for lives renewable for ever, upon the payment of a fine for every life added, confessed judgments, was discharged as an insolvent, and died. One of the lives in the lease being dead for some years, the landlord served notice upon the heir of the original lessee, a judgment creditor of the insolvent in possession under an *elegit*, and the assignee of the insolvent, who had not been in possession of any part of the premises, calling on them to renew. No renewal was taken out, and no tender made of the fine. In seven years afterwards, another judgment creditor of the insolvent, who had obtained a decree for a sale of the lands for payment of his judgment, with the sanction of the Court, in that suit, files a bill for a renewal.

THIS was a suit for a renewal. By indenture bearing date the 15th of June 1793, William Thomas Monseil demised to Michael Kenny part of the lands of Corbally, for three lives, with covenant for perpetual renewal upon payment of a half-year's rent as a renewal fine, upon the dropping of each life, within six months after it occurred.

Kenny, shortly after the execution of the lease, assigned to a person of the name of Patrick Power. One of the lives in the lease died in 1820, and no renewal was executed or applied for.

In Trinity Term 1819, a judgment for £600 was obtained upon a bond and warrant of attorney against P. Power; which, upon the 9th of July in that year, was duly assigned to a person of the name of Miles Staunton. Power, the conusee of that judgment, was discharged as an insolvent in 1825, and Edward Kennedy was appointed his assignee.

On the 7th January 1831, Kennedy was removed from the assigneeship by an order of the Insolvent Court of that date, and Michael Arthur was appointed assignee in his place. Arthur died some time in the beginning of 1833; and on the 26th April 1833, Michael Kenny was appointed assignee in his place. Kenny was removed from the assigneeship on the 30th July 1833, and John Carroll, who was a defendant to the suit, was appointed assignee. Neither Staunton nor any other of the judgment creditors of the insolvent had come in in the matter of the insolvency.

Power the insolvent died on the 11th of August 1832, leaving no personal property; and on the 14th of September in that year, Staunton filed a bill in Chancery on behalf of himself and all other judgment creditors of Power, for sale of his real estate.

To that bill Carroll, the assignee of Power, and Thomas Power his eldest son, were defendants; and on the 6th of April 1837, a final decree was pronounced, declaring Staunton and the other judgment creditors therein named entitled to the several sums therein mentioned, and declaring that the same were charges upon the real estates of Power

Held, that he was entitled to institute such a suit; and *Held*, also, that service of the notice was not sufficient to create a forfeiture of the right to a renewal. An assignee of an insolvent who is not in possession of the premises is not an "assignee" within the meaning of the first section of the Tenancy Act from whom to demand a renewal fine.

The landlord having, in the course of a negotiation for a renewal, required production of the assignment by the original lessee which was missing: *Held*, that that alone would have prevented the forfeiture.

In such a suit, a judgment creditor of the party entitled to the lease is a competent witness for the plaintiff.

therein mentioned, and amongst others, upon the lands of Corbally, and decreeing the land to be sold in default of payment within three months.

Upon the 3rd of July 1837, an order was pronounced in the cause of *Staunton v. Power*, upon the application of the plaintiff Staunton, referring it to the Master to inquire and report whether any and what proceedings should be taken before proceeding to a sale under the decree to compel a renewal of the lands of Corbally.

Before any proceedings were had under that order, Staunton died intestate; and John Smith, the plaintiff in the present cause, in the month of November 1837, obtained letters of administration to him, and upon the 20th of November 1837, filed a bill of revivor, and after a correspondence with the defendant Pierce Shannon, who in 1831 had purchased from Monsell the reversion of the lands of Corbally, and his solicitor, in which a renewal was refused, he proceeded upon the reference of the 3rd of July 1837. Upon the 12th of June 1838 the Master made his report, finding that before proceeding to a sale in the cause of *Staunton v. Power*, a bill should be filed to compel a renewal of the lease of Corbally, and that such bill should be filed in the name of the present plaintiff (Smith), as a trustee for the parties interested therein; and by an order of the Master of the Rolls, bearing date the 21st of June 1838, that report was confirmed, and it was declared that plaintiff should be at liberty to file a bill for a renewal, pursuant to said report.

Accordingly, on the 30th of August 1838, Smith filed his original bill in the present cause, stating the facts hereinbefore detailed, and stating that the only persons interested in obtaining a renewal were the judgment creditors of Power and the assignee Carroll; and that the latter, in order to embarrass plaintiff and the other creditors of Power, had declined to apply for or accept a renewal; the consequence of which would be, that unless Carroll were directed by the Court to accept the same as a trustee for plaintiff and the other creditors of Power, or unless same were granted to plaintiff as such trustee, the benefit of said renewal would be altogether lost to the creditors of Power.

The bill prayed that the defendant Shannon might be decreed, upon payment of all rent, arrears of rent, renewal and septennial fines, to execute a renewal to the defendant Carroll as assignee of the insolvent Power; or that in case Carroll should refuse to enter into the necessary covenants, that such renewal should be executed to plaintiff, who thereby offered to accept the same.

The defendant Shannon answered the bill upon the 11th January 1839, admitting the lease, and that it contained a covenant for perpetual renewal; but stating that he was ignorant whether any assignment by Kenny to Power was ever executed, and referring to the same when produced. The answer stated, that on the 19th October 1832, defendant, not knowing in whom the legal estate in the demised premises then was,

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served upon the heir-at-law of Kenny, the original lessee, upon Arthur, who claimed the beneficial interest in the lease as assignee of Power, upon a person of the name of Colpoys, an agent of Arthur, and upon Robert D'Esterre, who was then and continued to be in receipt of the rents of the demised premises, as an *elegit* creditor of Power, a notice stating the death of Kenny, one of the lives in the lease in 1820, and requiring the parties interested in the lease to pay the amount of the renewal and septennial fines, with interest, and to nominate a life and take out a renewal; and apprising them that if the same were not done in a reasonable time, he would consider the right of renewal forfeited. The answer further stated, that in December 1833, Carroll put up the premises for sale in Limerick, without describing the term for which they were held; and that defendant attended the sale, and stated publicly that the right to a renewal was forfeited.

The defendant denied that he had notice of the suit of *Stawnton v. Power* at the time of the service of the notice, and relied on the same and the subsequent neglect to pay the fines and take out the renewal, as disentitling the plaintiff to the relief sought.

On the 13th of July 1839, plaintiff filed an amended bill, making Thomas Power the heir of Power the insolvent, a party, and charging that Carroll the assignee, and Thomas Power the heir of the insolvent, claimed an interest in the demised premises, but that they refused to join the plaintiff in the suit. It further charged, that neither Arthur, nor Kenny, nor Kennedy, the successive assignees of Power, had ever been in receipt of the rents of the demised premises, and had no funds for payment of the fines, and that defendant Shannon was aware of the fact at the time of the service of the notice.

The defendant Shannon by his answer to the amended bill admitted that he did not serve the heir of Power the insolvent, nor any of his family, though he was aware of his death, and that none of the successive assignees of Power had ever been in possession or receipt of the rents of the demised premises.

The assignee Carroll by his answer alleged, that he was anxious to obtain a renewal, and he denied that he ever declined to apply for it.

Issue was joined in the cause on the 4th of April 1840, but before any witnesses were examined, the defendant Thomas Power died intestate; and on the 7th of April 1840, the cause was revived against his heir.

After issue had been joined and some witnesses had been examined, the plaintiff applied at the Rolls for liberty to amend the bill, by stating that the assignment from Kenny to Power the insolvent could not be found, and on the 8th of May 1840, leave was given to the plaintiff to amend the bill as stated, which was done accordingly.

On the 27th May 1840, plaintiff filed a supplemental bill, stating that since the pronouncing of the order of the 8th May, he had for the first time dis-

covered, that shortly after the 19th of October 1832, Arthur the assignee of Power had made several applications for a renewal to the defendant and his solicitor George Taylor Dartnell; and had offered to pay the renewal fines, but that the defendant and his solicitor refused to execute such renewal until the assignment to Power was produced. That Arthur and his attorney had in consequence made frequent searches for the assignment, but had been unable to discover it or any copy of it, and that the defendant on several subsequent occasions refused to execute the renewal, or accept the fines, until the assignment was produced, and did not assign any other reason for such refusal.

The supplemental bill also charged that defendant, at the time of the service of the notice to renew, was aware that the assignment was not forthcoming, and intended to make the production of it a condition precedent to granting a renewal. That plaintiff had also discovered since issue joined, that Arthur had on several occasions previously to October 1832 applied for a renewal, but that defendant and his said solicitor refused to execute a renewal, and stated that he never would do so until the assignment to Power was produced; "and plaintiff refers to a letter dated the 5th of April 1832, and written by George Dartnell, as solicitor for said defendant, to said Michael Arthur." That D'Esterre, after the 19th October 1832, applied for a renewal, but that such application was also refused for the same reason.

That defendant Shannon had bid for the demised premises when put up for sale by the assignee.

The defendant, by his answer to the supplemental bill, denied that Arthur made any application to him or his solicitor for a renewal, but admitted that Arthur was willing to have paid the fines and taken a renewal if he had funds sufficient for the purpose. He also denied that he or his solicitor ever stated that he would not execute a renewal until the assignment was produced, and stated that if Arthur had tendered the fines to him, he would have executed a renewal. He also denied that he or his solicitor had ever heard of the loss of the assignment, or that he had ever required the production of it as a condition precedent to granting a renewal. The defendant also denied all knowledge or recollection of the letter of Dartnell referred to in the bill. He stated, however, that upon one occasion subsequent to the 19th of October 1832, the solicitor of Arthur furnished to his solicitor Dartnell a statement of title (a copy of which he set out in his answer), in which it was stated, that the assignment to Power was not forthcoming, and that that was the first occasion on which he or his solicitor knew or suspected that the assignment was not forthcoming, but that notwithstanding, he was willing to have executed a renewal to Arthur, on being paid the fines.

It was proved in the cause, that an assignment from Kenny to Power had existed, and that search had been made for it ineffectually, but no evidence of its date or contents was given. It appeared, however, that

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rent had been paid by Power and those representing him, to the lessor Monsell as well as to the defendant Shannon.

D'Esterre, the *elegit* creditor, was examined in the supplemental cause, and deposed, that shortly after the notice of October 1832, he called on the defendant Shannon by desire of Arthur, respecting the renewal of the lease, and was referred by him to his solicitor Dartnell, who objected to grant the renewal until the assignment was produced. The witness, however, declined to swear positively that it was for that reason the renewal was not executed.

Another witness (William Green) who was attorney at the time for Arthur the assignee, deposed, that "on the occasion of a treaty for a renewal of the lease of 1793," the defendant Shannon refused to execute a renewal to Arthur without production of the original assignment, and that the assignment was not produced because it was lost or mislaid, although he made search for it. The witness deposed, that he first communicated the subject of his deposition to the plaintiff in the May preceding his examination (1841), and that he made such communication to the plaintiff in consequence of his having asked him questions upon the subject.

D'Esterre deposed, that "in or about the month of May last he was called on by the plaintiff, and asked what he knew of the lands and the renewal of the lease, and that he then informed him of what he stated in his deposition."

Dartnell, the solicitor of the defendant Shannon, deposed, that after service of the notice, Arthur, the assignee, had promised to pay the renewal fines, and had directed him to prepare a draft renewal, which he accordingly prepared, and which was proved in the cause. No tender or offer of the amount of the renewal fines, however, was ever made by Arthur. The same witness denied "according to the best of his recollection and belief," that he ever made or alleged the non-production of the assignment as a reason for not executing the renewal; and deposed, that he never did to his recollection or belief, nor did the defendant Shannon, as he knew or believed, at any time intend to require the production of the assignment as a condition for granting a renewal, or make the objection of its non-production a ground for not granting the renewal; and that he was perfectly convinced that if Arthur had paid the fines, the renewal would have been executed.

It was proved that the defendant Shannon attended when the premises were put up for sale, and that he stated publicly that the right of renewal was forfeited, and that he bid for them himself.

The letter of the 5th April 1832, was written by Dartnell as solicitor of Shannon, to Arthur the assignee, and stated that in consequence of Kenny, the original lessee, having held several leases from Monsell, he was under the necessity of requiring production of the original lease and the assignment of it to Power.

D'Esterre admitted on his cross-examination, that there was a considerable sum of money due to him on foot of his judgment ; but he stated that there was real property of the conuzor sufficient for the payment of it, independently of the lands of Corbally ; and that, therefore, he did not consider himself interested in the suit.

The reading of D'Esterre's depositions was objected to by the Counsel for the defendant, on the ground that he was incompetent from interest ; and they cited for this purpose the case of *Holden v. Hearn* (a) ; and relied on the effect of the recent act (b) making judgments charges on real estates.

The Counsel for the plaintiff contended, that this was not the case of a creditor seeking to increase a common fund, out of which he was to receive a proportionate part, for that the judgment creditor in the present case had not gone in under the insolvency, but rested on his judgment ; and that there was an ample fund for payment of his debt, whatever were the result of the present suit.

The LORD CHANCELLOR.—I am not able to come at the grounds upon which it is contended that this witness is incompetent.—The plaintiff does not claim under the insolvency, he has never taken the benefit of those proceedings. The plaintiff's claim is paramount to the insolvency, he is coming here to enforce a right to an estate, which when recovered, he will be able to make available for the payment of his debt, against a party who is bound to grant a renewal ; and when the estate is recovered, the witness (D'Esterre), it is true, will be better off, as he will have a better security for his judgment, but no case has gone the length of deciding that a witness under such circumstances is disqualified ; and I must, therefore, overrule the objection.

Mr. Blackburne, Q. C., Mr. Blake, Q. C., and Mr. O'Brien, for the plaintiff.

The defendant in his answer relies on two grounds of defence to the renewal ; viz., that Power was not assignee of the lease, and that the right of renewal was forfeited by non-compliance with the requisition contained in the notice of the 19th October 1832. The former ground of defence, however, is abandoned by his Counsel, and the title of Power as assignee is admitted. Two other grounds of defence, however, are set up at the Bar ; first, that our suit is improperly constituted for want of a title to sue in the plaintiff : and, secondly, that our suit has been improperly conducted, because matter was put in issue by the supplemental bill which we had no right to bring forward in that manner. It is true, generally speaking, that a creditor upon an estate cannot bring a

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(a) 1 Beavan, 445.

(b) 3 & 4 Vic. c. 105, s. 22.

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debtor to that estate before the Court ; but that rule is subject to several exceptions—as where an executor is insolvent, or is in collusion with the debtor ; wherever, in fact, a special case is made for the purpose, and such a special case is the present. The orders in *Staunton v. Power* bring this case within the principle of *Burroughs v. Elton* (a), where a bill by a judgment creditor against parties accountable to the estate of the debtor was sustained, upon an allegation that the executor refused to act and was insolvent. In *Troughton v. Binkes* (b), relied on on the other side, although the Master of the Rolls (Sir R. P. Arden) dismissed the bill on the ground of want of privity between the plaintiff and the defendants, yet, he states in his judgment, that if a special case were made it would be different. Here the judgment creditors are the only persons interested in procuring this renewal ; and as there will be very little, if any, surplus for the creditors who have proved under the insolvency, the assignee who represents them refuses to take any active step to procure it. For the same reason the heir of Power is passive in the matter, and the right would be utterly lost if we did not come forward. We obtained the sanction of the Court to our proceedings, and this suit has in fact been instituted under its direction. As to the objection that we have not shewn that the matter of our supplemental bill was discovered after issue joined, both Green and D'Esterre swear that it was in May last that they communicated to the plaintiff the facts relating to the assignment ; and if there be any thing ambiguous in the wording of their depositions as to the time of the communication, we are willing that they should be examined upon interrogatories, as to the time when they first communicated those facts to the plaintiff.

With respect to the main grounds of defence set up by the defendant Shannon, namely, that the right of renewal is forfeited in consequence of the non-compliance with the notice, we contend that it was not served upon the proper parties. The heir of Power was not served, nor any member of his family, and service upon the assignee alone is insufficient to work a forfeiture of an interest, or to divest a right vested in the insolvent. Although in a suit respecting that interest, the assignee may sufficiently represent the insolvent before the Court ; yet it is quite different as to a proceeding out of Court, the object of which is to work a forfeiture. The assignee of an insolvent differs from the assignee of a bankrupt in this respect, that the former takes the estate subject to the rights of the judgment creditors, and in the present case the judgment creditors were in receipt of the rents until the appointment of a receiver in this cause. The assignee, therefore, never received any portion of that which was the proper fund for payment of the renewal fines, namely, the rents. The judgment creditor who was in possession had no interest in renewing, and

(a) 11 Ves. 29.

(b) 6 Ves. 573.

neither the heir nor any of the other judgment creditors was served.

The estate of an insolvent is vested in the assignee only for a particular purpose, viz., the payment of his debts; and subject to that, it belongs to the insolvent himself. If no assignee were appointed, would the service of such a notice on the provisional assignee have the effect of working a forfeiture? If not, where is the distinction?

But even if the Court should think that the service was sufficient, yet we were not too late in seeking a renewal at the time our original bill was filed. It appears six years had elapsed since the demand was made, but in estimating what is a reasonable time within which to comply with it, the Court has always taken into consideration the circumstances of the tenant. *Jackson v. Saunders* (a). The Tenantry Act (b) only fixes the terminus from which the computation of "reasonable time" is to begin, but it leaves the jurisdiction exercised by the Court in computing what is to be "reasonable time," in each case, unaffected. Here, until there was a final decree in *Staunton v. Power*, there was no one who had either an interest in seeking a renewal or the means of procuring it. The property was under the management of the Court since the institution of that suit, which was prior to the service of the notice, so that the defendant's proceedings have been taken "*pendente lite*."

Independently of that, however, the defendant himself has been the cause of preventing the renewal, by requiring the production of the original assignment; and it is well settled that when a landlord throws difficulties in the way of a tenant seeking a renewal, he cannot avail himself of the tenant's neglect; *Mulvihill v. Butler* (c). Now, although it is denied by the defendant's solicitor, that the production of the assignment was insisted on, yet he only speaks according to the best of his recollection, while we have two witnesses speaking positively to the fact, and we have their testimony confirmed not only by the letter of the 5th of April 1832, but by the defendant's answer, in which he questions our title as assignee; and it is only at the hearing, when we have proved it satisfactorily that it is admitted.

Mr. Pennefather, Q. C., Mr. Warren, Q. C., Mr. Keatinge, Q. C., and Mr. Francis A. Fitzgerald, for the defendant Shannon.

The plaintiff here has no title to sue; there is no privity between him and the defendant, which has always been held necessary to enable a party to institute a suit against another. The assignee of the insolvent represents him for all purposes, and has vested in him the estate which is the subject matter of this suit. If any claim to it were made by a third party, it would be sufficient to bring the assignee alone before the Court. In *Collett v. Woollaston* (d), it was held that an insolvent was

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(a) 1 Sc. & Lef. 443.

(b) 19 & 20 Geo. 3, Ir. c. 30.

(c) 1 Bligh, 137.

(d) 3 B. C. C. 228.

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not a necessary party to a suit against his assignee by a purchaser of his life interest in certain stock. In *Lloyd v. Lander* (a), it was held that a bankrupt was not a necessary party to a bill of foreclosure against his assignees, and a demurrer by him was allowed, although no bargain and sale was executed. In *Kerrick v. Saffery* (b) it was held that a mortgagor who had become bankrupt was not a necessary party to a suit for a foreclosure. It has even been held that it is improper to make an insolvent a party to such a bill. *Collins v. Shirley* (c). If therefore, an assignee sufficiently represents the insolvent or bankrupt, in suits against the estate, it follows that he is the proper person to institute suits respecting it. He alone has any privity with the defendant in the present case; and that it is essential that there should be privity between the parties to enable one to sue the other is well established. In *Utterson v. Mair* (d), a bill filed by a creditor of a deceased bankrupt against the assignees and executors was demurred to by the assignees, and the demurrer was allowed. In *Troughton v. Binkes* (e), a bill filed by four persons, claiming as creditors under a deed of trust for the payment of debts, against a mortgagee of their debtor, for redemption of a mortgage, was dismissed as against the mortgagee for want of privity. It is said that where a special case is made, the rule is dispensed with. But, admitting the truth of that proposition, has such a special case been made in the present instance? No proof has been given that the assignee has refused to become a plaintiff; he even alleges in his answer, that he is anxious to renew.

Supposing, however, that the plaintiff has a title to sue, he has no ground of suit. The right of renewal was put an end to by the service of notice of the 18th of October 1832, and the subsequent default. It is said that we ought to have served the heir of Power, but for what purpose? He was not in possession of the land, nor in receipt of the rents, nor had he any estate in the premises. All the estate of Power was vested in his assignee; and the cases which have been cited to shew that an assignee completely represents the insolvent in all proceedings in Court relative to the estate, equally shew that the assignee represents him for all purposes out of Court. The *eligit* creditor was the person whose duty it was to have paid the renewal fines, as he was in the receipt of the funds from which they should come. We served him and the party having the legal estate in the lands, and the heir of the original lessee; and at that time there was no evidence of the assignment to Power. The Tenantry Act requires the demand to be made from "the tenants or their assigns." That means an assignee of the legal estate, and so it has been held by Lord Redesdale in *Barrett v. Barks* (f)

(a) 5 Mad. 282.

(c) 1 Russ. & My. 638.

(e) 6 Ves. 673.

(b) 7 Sim. 318.

(d) 4 B. C. C. 270.

(f) 5 Dow. P. C. 20.

The Insolvent Act which was in force when Power was discharged was the 1 & 2 G. 4, c. 59, the 8th section of which enacts, that the assignment to the provisional assignee shall vest in him all the estate of the insolvent; and the 11th section enacts, that the provisional assignee shall convey such estate to the creditor's assignee. Before the service of the notice, the 3 G. 4, c. 124, was passed, amending the former act, by preserving the rights of judgment creditors against the insolvent's estate, but not affecting the quantity of estate vested in the assignee. In *Baldwin v. Bridges (a)*, when a conveyance had been made to trustees for creditors, a notice served upon these trustees was held sufficient. As to the suit of 1832, that was by a creditor of the tenant to make his rights available against the tenant's property, and cannot affect the right of a landlord; and even if the defendant knew of that suit, he was not bound to take any notice of it. At the time the lands were put up to auction in 1833, the defendant's objection to granting a renewal was distinctly stated by him; and from that time until the present bill was filed, nothing has been done.

As to the defendants having insisted on the production of the assignment, as stated in the supplemental bill, in the first place, the plaintiff has not shewn that he discovered it after issue joined. The language of the witnesses D'Esterre and Green is equally applicable to a communication before issue joined as after, although the interrogatories were pointed distinctly to the fact of a subsequent communication. Both those witnesses were examined in the original cause, and said nothing of this fact. But even supposing this evidence to be admissible, still the Court should attach very little weight to it. D'Esterre, although the Court has held him to be a competent witness, still speaks under a very great bias; not only because of his being a judgment creditor, but also because the plaintiff's success in this suit will release him from all the consequences of not having complied with the notice, as it was his duty to do, being in receipt of the rents at the time. Putting him out of the case, there remains only Green, whose testimony is contradicted not only by the positive swearing of the defendant in his answer, but by the positive testimony of Dartnell. As to the letter of the 5th April 1832, we have been prevented from giving any explanation of it, because the plaintiff refused to give us a copy of it, and we see it now for the first time. Supposing, however, that the defendant did require production of the assignment, it was the duty of those seeking the renewal to have tendered the renewal fines, which it is not pretended that they did.

Mr. O'Brien, in reply.—The object of the service of a notice is to apprise the party interested that the landlord intends to insist on a for-

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(a) Ll. & G. cas. temp. Plunket, 408.

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feiture; and for that purpose the heir of the insolvent should have been served. It is that which makes the distinction between the present case and those in which it has been held that the insolvent is not a necessary party to a suit for divesting his estate, through the intervention of the Court. According to the doctrine on the other side, it would have been sufficient to have served the provisional assignee. As to the case of *Barrett v. Burke* (a), relied on on the other side, the bill there was dismissed on a different ground, namely, fraud on the the tenant's part, and the publication of the notice in the *Gazette*; also upon the ground that an issue had been directed which was not warranted by the evidence.

As to the want of a tender on our part, wherever it is clear that a tender, if made, would be rejected, the tenant is not bound to prove it, *Trant v. Dwyer* (b).

Feb. 26.

The LORD CHANCELLOR this day delivered the following judgment.
 [After stating the facts of the case]—

Some preliminary objections have been made to the frame of the suit, which I think it right to dispose of before going into the main question between the parties. It is said that a creditor is not entitled to institute a suit of this nature, except through the medium of the assignee; and the cases relied on for that position are those which have arisen respecting the right of a creditor of a deceased party to join a debtor of that party with the executor in a suit for the recovery of his debt. The doctrine of the Court in such a case has been too broadly laid down; and even if it held good to the fullest extent in which the rule has ever been expressed, it is not applicable to the present case. The true rule upon the subject is laid down by Lord Hardwicke in *Newland v. Champion* (c): “The general rules are plain, that a creditor of the testator or intestate need not make any body but the personal representative a party. At the same time, in this Court, if there are any persons who have possessed the estate, or any debtors of the deceased, and any collusion between them and the representatives, they may here, though not at Law, follow the assets and make them parties.” He does not say that a creditor cannot or must not join the debtor with the executor, but only that he need not do so; and he acted on that rule in that case by sustaining a creditor's bill against a debtor joined with the executor, because he had specific assets of the testator in his hands. This is only one instance of the application of the rule, which may be collected from all the cases, that where there are special circumstances to justify such a course, a creditor may unite a debtor of his debtor in a suit against the executor.

(a) *Ante*.

(b) 1 Dow. & Clarke, 125

(c) 1 Ves. sen. 105.

In *Alsager v. Rowley* (a), Lord Eldon held, that the circumstance that the creditor of a testatrix was her confidential agent, was a special circumstance sufficient to form an exception to the general rule of not joining the debtor with the executor; and in like manner, in *Doran v. Simpson* (b), the debtor's filling the character of trustee and agent, was held to justify his being joined in the suit. Wherever relief has been refused in suits of that description it is where it has been sought against a general fund, but in no case has it been refused where sought merely against a person who is a debtor to the estate of the testator, by reason of his having specific assets in his hands. The present, however, is a much stronger case than any of those; the creditor here does not claim under the insolvency, but paramount to the insolvency; and by the Insolvent Act the rights of judgment creditors are preserved, and they are entitled to abide by their rights as such, if they choose not to come in under the insolvency. The plaintiff and the other judgment creditors have done so in the present case, so that their rights are unaffected by the insolvency.

I have said so much with respect to the objection taken to the constitution of the suit, because the rule in such cases appears to me to have been misunderstood, but in the present case the objection appears to me to be precluded by the proceedings in Staunton's suit; the effect of them is to put an end to all question as to plaintiff's right to file the present bill, a right which grows out of the notice served by the defendant; and which, after the decree establishing the rights of the judgment creditor, it is not, in my opinion, open to the defendant to question.

Another objection has been made to the form of plaintiff's proceedings: that it has not been proved that the supplemental matter was known to him for the first time after issue joined. The answer to that is, that he has given proof, and, in my opinion, satisfactory proof of it: and in the course of the discussion it was proposed by his Counsel, that further interrogatories should be administered to the witnesses, and that proposition has been declined on the part of the defendant. I do not think, therefore, that there is any weight in that objection either.

So much for the preliminary objections taken to the form of the plaintiff's proceedings. As to the general question between the parties—Is the defendant discharged from the covenant for renewal contained in the original lease? The plaintiff says no, because the defendant annexed a condition to granting the renewal which it was impossible then to have complied with; and expressly declared that he would rest his refusal to renew on the non-production of the assignment to Power. If this be made out, it is, according to *Trant v. Dwyer*, a full answer to the defendant's case; for according to that decision, wherever a landlord annexes a condition to the granting a renewal with which the tenant cannot

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(a) 6 Ves. 749.

(b) 4 Ves. 651.

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comply, it is unnecessary for the tenant to tender the renewal fine. On the part of the defendant the legal effect of such an act is not disputed, but the existence of the fact itself is denied. He contends that one of the witnesses who deposed to the fact is incompetent, and that the Court cannot act upon the testimony of the other in opposition to the denial contained in the defendant's answer. Now, first, as to the incompetency of D'Esterre, it is said, that he being a judgment creditor of Power the insolvent, cannot be a witness for the purpose of establishing the right of Power or his assignee; and the well known cases in bankruptcy, in which it has been held, that a creditor is an incompetent witness to increase the fund out of which he is to be paid, are cited in support of that proposition. Now those cases appear to me to have no application to the present case. The plaintiff here claims, not under the insolvency, but paramount to it, and in opposition to the general creditors. Then it is said D'Esterre is a creditor, whose means of payment will be increased by the plaintiff's succeeding in the suit. But has it ever been held that on a bill filed by a third person to recover an estate, a creditor of that person is not a competent witness to support his right, merely because his security for his debt will be bettered by the success of the plaintiff? It is admitted that a simple contract creditor would be a competent witness, and I cannot see on what ground a judgment creditor is less competent—or that because the judgment creditor can go into possession of the lands by suing out an *elegit*, or into receipt of the rents by getting a receiver appointed, that, therefore, the judgment creditor is an incompetent witness; nor do I think the late statute makes any difference in this respect: besides, it is proved here that the conusor had other property, which is ample security for the payment of D'Esterre's debt. But then it is said, that supposing D'Esterre to be a competent witness, that the Court cannot give credence to his testimony and that of Green, the other witness, when opposed to the positive swearing of the defendant, and the testimony of his solicitor Dartnell. I have no reason to doubt the respectability of the defendant and of Mr. Dartnell; or, on the other hand, that of the witnesses for the plaintiff. I must consider them equally respectable—I must weigh their testimony by their acts and by the circumstances of the case, in considering whether the condition stated before was annexed by the defendant to the granting a renewal. The defendant and his solicitor probably deceived themselves into the belief that they only required the production of this assignment, but did not make it an indispensable condition to granting the renewal. Green in his deposition states positively that it was insisted on by the defendant, and he specifies particularly the occasion when it was required; Dartnell swears that he believes the defendant never insisted on the production of the assignment, and that he was always ready to have executed a renewal upon payment of the renewal fine; but this is only his belief as to what the defendant would have

done, opposed to the positive testimony of Green. But in addition to that, I have the letter of Dartnell himself; and I have the answer of the defendant.—[Here his Lordship read the interrogatory from the bill, and the passage from the answer, stating that the defendant was ignorant of the nature of Power's title, and referring to such proof as the plaintiff should make of it.]—When I am called on to weigh the probabilities of the case, I cannot throw out of my consideration those acts of the party himself; and when I have to decide on opposite swearing, I cannot put out of view the undoubted fact that the party did at one time set up this objection, and that there is no distinct evidence of its ever having been abandoned. I do not think, therefore, that I would be justified in directing an issue to ascertain a fact which I think the evidence in the cause abundantly establishes. What a defendant swears in such a case as this should be narrowly examined. From the moment that he purchased those lands he exhibited the greatest desire to get rid of this covenant for renewal, and manifested from the commencement a desire to act much more rigorously than the former owner.

So much upon the first ground of objection to granting this renewal. But the notice which has been served in this case is not sufficient to deprive the tenant of his right to a renewal, and that alone would be a decisive answer to the case set up by the defendant. The defendant relies on the provisions of the Tenantry Act as destroying the right to a renewal, and the question turns upon the construction of that act. In construing that act, the title of it is very material; it is entitled "An act for the relief of tenants holding under leases for lives, with covenants for perpetual renewal:" so that the professed object of the act was to give relief to tenants. The preamble also is very material.—[Here his Lordship read the preamble of the act.*]

Then in the body of the act it is declaratory as well as enacting—"be it declared and enacted that Courts of Equity upon an adequate compensation being made shall relieve such tenants and their assigns, if no circumstances of fraud be proved, unless it shall be proved to the satisfaction of such Courts, that the landlords or lessors or persons entitled to receive such fines, had demanded such fines from such tenants or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand." This latter clause was introduced for the benefit of landlords, and the defendant's claim to be discharged from the covenant for renewal rests on that and on the following provision, "Provided always, that in case the landlord shall find any difficulty in discovering his tenant or the assignee of such tenant, so as to make a demand on such tenant or his assignee, that then and in every such case, a demand made of the said fine on the

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* See the act itself in the Appendix to Mr. Lyne's work on Renewable Leases, p. 273.

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"lands from the principal occupier of the same, together with a notice of such demand to be inserted for the space of two months in the London and Dublin Gazettes, shall be considered to all intents and purposes a demand within this act."

Every word of this act is material in considering the question which arises in this case, namely, was the assignee of the insolvent an assignee within the meaning and spirit of that act, and is he to be held so in Courts of Equity to which the act more particularly referred? and that in construing an act which is entitled "An act for the relief of tenants," the professed object of which was to relieve the tenants holding under such leases.

It is most material in this part of the case to consider what was the situation of the assignee at the time when this notice was served on him. He had never been in possession of the lands, either by receipt of the rents or otherwise. The lands were at that time in the possession of *elegit* creditors, who claimed adversely to the assignee. This fact was known to the defendant Shannon, for he had himself received rent from the *elegit* creditor. At that time, also, a bill had been filed by a judgment creditor, to establish his right, and that of all the other judgment creditors of the insolvent in opposition to the rights of the assignee, in which suit a decree was afterwards obtained. Lord Redesdale, who had carefully considered the construction of this act, and settled it in a way that has always been acquiesced in and approved of, says, in the case of *Barrett v. Burke (a)*, "in my opinion the meaning of the act is, that the moment a demand is made, the neglect when it goes beyond a reasonable time for payment ceases to be mere neglect, and becomes wilful." Now, applying that principle to the present case, was it "wilful neglect" in the tenant, who was not served with this notice, not to have tendered the renewal fine? Was it "wilful neglect" in the assignee, who was never in possession of those lands, or in receipt of the rents, and who had no right to either, that he did not pay this renewal fine? or is a Court of Equity to say that the service of such a notice upon an assignee thus circumstanced is to have the effect of destroying the right of renewal? The cases which have been cited to shew that an assignee of a bankrupt or an insolvent sufficiently represents his estate, and that it is not necessary to bring the party himself before the Court, have in my opinion no bearing upon the present question. I need not repeat the observations I have already made upon another part of the case, shewing that in many instances a creditor may unite a debtor in a suit against the executor. It is perfectly clear, that if a bill had been filed against an assignee to impeach a contract entered into by the insolvent, previous to his insolvency, the latter would be a necessary party to the suit. But all the

(a) 5 Dow. 16.

decisions referred to were made upon the subject of representation in causes in Court, and they were grounded upon the inconvenience that would follow, if it were not held that the assignee sufficiently represented both the estate and the creditors. But the notice here is not an act done in any cause, it is an act done out of Court by a party who might serve any person he chose, and who might have effected this without expense or inconvenience. Suppose now, all the lives in this lease had been dead, could the landlord, by serving a notice to pay the renewal fine upon a person not in possession, extinguish the equitable interest and thus change the possession? It is a well established principle of the law, that when the possession of land is sought to be changed by any proceeding, the party in possession shall have notice of that proceeding. It is true that in the present case the immediate possession would not be affected, because there are two lives in existence; but, is the circumstance of one or more lives being in existence to establish a distinction, and is that to be held a good notice in the one case which would be bad in the other?

The ejectment statutes provide carefully for the service of the party in possession, and the Tenantry Act contains a provision for the case where the landlord shall find any difficulty in discovering the "tenant or the assignee of such tenant." Let me put another case:—Suppose the party entitled was wrongfully evicted from the possession, would the service of notice upon the person thus wrongfully in possession have the effect of depriving the rightful owner of his right of a renewal? In my opinion, the word "tenant," in the act, means "tenant in possession;" and the word "assignee," in the act, means the same thing as if the Legislature had said "assignee in possession:" and in construing an act passed for the relief of tenants, I am bound to protect the parties for whose relief the act was passed.

Suppose another case:—Suppose an actual assignment had been made of those very lands for particular purposes, reserving the right of the assignor to the lands, when those particular purposes had been satisfied, would the service of a notice on such an assignee deprive the assignor of his right to insist on the benefit of the covenant for renewal? If it would not, then, how can an assignment which, although general in its terms, is made for a particular purpose—namely, the payment of debts, and which leaves in the party assigning a right to any surplus that may remain after that purpose is satisfied—have a greater effect than an assignment of those very lands, which was expressly declared to be for a particular purpose, would have had? It appears to me that it might as well be said that the assignee of an insolvent could make a good tenant to the *præcipe*.

Lord Redesdale, in his judgment in *Barrett v. Burke*(a), says, "In

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(a) *Ante*.

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"looking at the act, it does not appear that any formal demand is necessary; but the party having made it, the time is to be computed from the period of the demand, and the prior demands are waived by the subsequent formal demand, if the fines are paid within a reasonable time after that demand. But, then, it is to be considered what former demands were made with reference to the point of neglect, and the question, what is a reasonable time after the formal demand?" Now, if this is to be done for the landlord, how much more ought such a wide and rational construction of the act be adopted in favour of the tenant, whom the act was intended to protect—and that in a Court of Equity, to which the act is particularly pointed. In *Barrett v. Burke*, the notice had been served on the tenant in possession; and yet the landlord considered it necessary to insert a notice in *The Gazette*.

It has been properly asked, if the property had remained vested in the provisional assignee, would he be the proper person on whom to serve such a notice? and would the service of a notice on him be sufficient to create a forfeiture? It can scarcely be contended that such a consequence would result from it, and if the Court be not bound by the technical meaning of a word, its power to give relief is not affected by the service of a notice such as this. Besides, the defendant himself has admitted that the service was insufficient, for he serves both D'Esterre, then in possession, as an *elegit* creditor, and Michael Kelly, the heir of the original lessee. If, then, the case rested on that alone, I would give the relief sought, upon the ground that an assignee of an insolvent who is not in possession of the lands is not an assignee within the meaning of the Tenantry Act upon whom to serve a notice to work a forfeiture. I am equally satisfied, however, upon the other ground, namely, the lessor's requiring the production of the assignment.

With respect to the costs, the original default was in the plaintiff in not paying the renewal fine when demanded; but on the other hand, the defendant, by insisting on the production of the assignment after he was aware that rent had been paid by Power to Monsell, from whom he purchased, and after he himself had received rent from the *elegit* creditor of Power, acted most inequitably, and subjected himself to the costs of that part of the suit, so that I think there should be no costs on either side.

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CUFFE v. CUFFE.

Feb. 25, 26.

THIS case came on upon exceptions to the Master's report.—The bill sought an account of the personal estate of Gregory Cuffe from the defendant as his administrator. There had been a great deal of litigation between the parties, none of which it is necessary to refer to here, except that the plaintiffs by their bill sought to make the defendant liable for wilful default in not having renewed a College lease, to which the intestate was entitled,—and introduced charges to that effect into the bill, which were denied by the answer.

The decree directing the account was silent as to wilful default, and the defendants now sought, upon the facts appearing upon the Master's report, that the report should be sent back to the Master with a direction to inquire as to wilful default.

Mr. *W. Brooke*, Q. C., and Mr. *Blake*, Q. C., for the plaintiffs.

Where the decree is silent as to wilful default, and a case warranting such a direction appears upon the Master's report, as is the case here, the course is, to send it back to the Master with a direction to inquire into wilful default; *Booth v. Purser* (a); *Townsend v. Travers* (b); where a *prima facie* case is made at the hearing, the direction is inserted in the decree; *Law v. Hunter* (c).

Mr. *Warren*, Q. C., and Mr. *Monahan*, Q. C., for the defendant.

The case of default here was made by the bill, and after having failed to establish it at the hearing, the defendant cannot be permitted to litigate the question again, and so it has been decided in *Garland v. Littlewood* (d).

The LORD CHANCELLOR.

I have no recollection of the case of *Booth v. Purser*, which has been cited in the discussion, but the reasoning of the Master of the Rolls in the case in *Beavan* appears to me very satisfactory. It appears to me, that where a party has set up a case of wilful default in his bill and failed in establishing it, that he ought not to be permitted to litigate it again; and I should, therefore, on that ground refuse the special direction sought, even if there were sufficient grounds on the report to warrant it.

Upon the following morning his Lordship delivered the following observations.

(a) Ir. Eq. Rep. 33.

(c) 1 Russ. 100.

(b) 1 Mol. 496.

(d) 1 Beavan, 527.

In a suit for an account of an intestate's personal estate the bill sought to charge the administrator with wilful default, and contained charges to that effect. The decree directed only the ordinary accounts: *Held*, that nevertheless the Court would direct an inquiry as to wilful default, if on the Master's report there appeared facts to warrant it.

The 204th Rule does not take away the discretion of the Court as to the rate of interest to be charged upon balances in the hands of executors, administrators, &c.

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In refusing to give to the plaintiffs the direction which they sought as to wilful default, I beg it to be understood that I do so solely because there are not sufficient grounds appearing on the report to warrant me in doing so, and not at all upon any general principle. Since yesterday, I have looked into the authorities, and referred to the case of *Booth v. Purser*, which certainly clashes with the case before Lord Langdale, but which nevertheless appears to me to have been properly decided. I would not for a moment put my own authority in competition with that of Lord Langdale, but it does not rest on my authority alone. In the case of *Townsend v. Travers*, the subject was a good deal considered by Sir A. Hart, and he held that it was a matter resting in the discretion of the Court. There is also the case of *Franklin v. Beamish*, cited before Sir A. Hart, to the same effect; and he differs from the Master of the Rolls in this respect, that he holds that where there is probable cause appearing on the report, not merely an absolute certainty, that the Court would be warranted in giving such a direction. In the case before Lord Langdale, I observe that the reporter does not state that any cases were cited, or that the question was discussed.

For these reasons, therefore, I wish it to be understood, that I refuse the direction as to wilful default upon the special facts of this case.

A question also arose as to the amount of interest which was to be charged against the defendant upon certain balances which appeared by the Master's report to have remained in his hands.

The Counsel for the plaintiff relied upon the 204th Rule, as entitling them to interest at £6 per cent.

On the part of the defendant, it was not disputed that he was liable to the payment of interest; but it was contended that the 204th Rule did not take away the discretion of the Court as to the rate to be charged, and that there were circumstances in the present case to induce the Court to charge a lower rate than £6 per cent.

The LORD CHANCELLOR,

(After detailing the special facts of the case), said he did not think that the 204th Rule took away the discretion of the Court, and directed that interest should be charged against the defendant at £5 per cent. only.

1841.
Rolls.

MEAGHER v. O'MARA.

(In the Rolls.)

May 13, 14.

MR. W. SMITH, for the plaintiff, moved that the name of James M'Donnell, lately appointed in the place of Thomas Going deceased, assignee of the estate of John O'Mara, an insolvent debtor, be substituted for the name of the said Going, who was made a defendant in this cause as assignee of the said O'Mara; and that the plaintiff might be at liberty to proceed in this cause against the said James M'Donnell, as such assignee, as if he had been originally the defendant.

Where a party made defendant as assignee of an insolvent debtor, dies pending the cause, a supplemental bill is necessary to bring the new assignee, appointed in place of the deceased, before the Court. The 41st section of the late Insolvent Act (3 & 4 Vic.), applies only to the case of plaintiffs and not to defendants.

The late defendant, Going, died in February 1841, and M'Donnell was appointed in his place on the 17th of April following. Going had instituted a suit in the Court of Exchequer to obtain a renewal of the lease of the same lands which were the subject of the present cause, and a special order under 3 & 4 Vic. c. 107, s. 41,* was made at the hearing of that cause, whereby the name of M'Donnell was substituted for that of Going as sole plaintiff; but there being a cross bill to which Going was a defendant, a supplemental bill was considered necessary to bring M'Donnell before the Court in the cross-cause. However, the present application was made lest, in the event of a supplemental bill being filed, it might in this case be objected at the hearing of the supplemental cause, that under the 41st section of the late Insolvent Act, the new assignee may have been made a party by amendment.

The MASTER OF THE ROLLS said that the 41st section of the 3 & 4 Vic. c. 107, appeared to him to apply only to the case of plaintiffs, and that he thought there were technical difficulties of an insuperable kind in the way of construing it so as to include defendants. He therefore made no rule upon the motion.

May 14.

* The following is the 41st section of 3 & 4 Vic. c. 107 (the late Insolvent Act):—
 "And be it enacted, that whenever any such assignee or assignees shall die or be removed, or a new assignee or assignees shall be appointed in pursuance of the provisions of this act, no action at Law or suit in Equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new appointment, allow the name or names of the surviving or new assignee or assignees to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees in the same manner as if he or they had originally commenced the same."

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Sunder.

HOWLETT v. LAMBERT and others.

April 22.

The 19th General Order of Nov. 1834, as to plea and demurrer, does not apply to a plea of the pendency of another suit for the same subject-matter, where the only question upon the plea is as to its truth. Such plea should not be set down for argument, but the plaintiff should serve notice of motion for a reference to the Master as to the question of fact—whether the two suits are for the same matter.

THE plaintiff was a creditor of James Lambert deceased, and having in that right obtained letters of administration to him, as in case of intestacy, he, on the 4th of January 1838, filed a bill against the next of kin for discovery of assets, setting forth his rights as administrator and principal creditor of the deceased. After several witnesses had been examined and the cause was ready for hearing, the defendants lodged a will, and, on the 16th of July 1839, had the plaintiff's grant of administration revoked, and new letters, with the will annexed, granted to themselves. The plaintiff's suit having thus become abated, he on the 17th of December 1839, filed a general creditor's bill, praying payment of his debt, and also of his costs incurred in taking out administration and in the former suit. To so much of this bill as sought payment of the debt, the defendants pleaded the Statute of Limitations, and demurred to the rest. The plea was allowed, and the demurrer was overruled (a). The defendants subsequently filed their answer, and the plaintiff replied; but, pending those proceedings, the plaintiff filed a supplemental bill in the cause instituted in January 1838, setting forth the nature, object, and prayer of the original bill,—the several proceedings had in the cause,—the abatement, and the manner of it, and praying that the plaintiff, as a creditor of James Lambert deceased, might have the benefit of said suit and proceedings, and be at liberty to continue them, and that the accounts might accordingly be taken, and his demand paid, &c. To this bill, the defendants on the 22nd of March 1841, pleaded the pendency of the suit instituted in December 1839, and the order allowing the plea of the Statute of Limitations in that cause (b); and that the two suits were for the same matter. The plaintiff, intending to controvert this plea, set it down for argument, supposing it should otherwise stand admitted under the 19th General Order of November 1834; and it being now called on for argument,—

Mr. Brewster, Q. C., and Mr. Francis Ball, appeared to support the plea.—They insisted that as no objection was taken to the form of the plea, the only question upon it was whether it was true in fact, and that the plaintiff by setting it down for argument must be taken as admitting its truth. If he intended to controvert the fact that the two suits were

(a) See the case, *ante*, vol. 2, pp. 254, *et seq.*

(b) See *Houlditch v. Denegal*, 1 Sim. & Stu. 494, 5.

for the same subject matter, he has mistaken his course : he should have taken a reference to the Master to inquire and report as to the fact, and he must pay the costs of improperly setting down the plea : *Jones v. Wattier* (a).

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Mr. Collins, Q. C., and Mr. Thomas Kennedy, for the plaintiff.—The English practice does not apply. The 19th General Order* makes no exception, and requires the plea or demurrer to be set down for argument in every case in which it is intended to resist it ; and declares that if not so set down, it shall, after fourteen days from service of the notice of it, be deemed allowed with costs. When this plea was filed, the Court was not sitting, and we had no opportunity of applying on the subject, nor had we any safe mode of proceeding, but by an exact observance of the General Order. There can be little doubt that if we had attempted the English practice, the defendants would have relied upon the 19th General Order. We submit that we are clearly within the rule, and if the Court would be so good as to look into the two bills, there would be no occasion for a reference.

MASTER OF THE ROLLS.

I think that the question upon this plea is for the Master, and that the 19th General Order was not intended to apply to such a plea. I do not remember to have had any previous case of this kind before me ; however, I am of opinion that the plaintiff should not have set down the plea, but have served notice of moving for a reference to the Master to inquire whether the two suits are for the same subject matter. As this is the first case of the kind that has occurred, and as the plaintiff may have been misled by the language of the 19th General Order, I will not give costs.

ORDER :—It appearing that the plea to the bill in this cause was filed on the 22nd March 1841, when the Court was not sitting,

(a) 4 Sim. 128.

* 19th General Order, Nov. 1834.—“That the plaintiff shall be allowed fourteen days from the day on which he shall be duly served with notice of a demurrer, or plea filed, to allow the same by notice on payment of costs, and thereupon he shall be at liberty to amend the bill, making such amendment within fourteen days, or set down the same with the Registrar for hearing, and duly serve notice thereof, and in default the demurrer shall be allowed with costs ; and in case of a plea, the same shall be allowed with costs, and deemed thereafter valid in substance and form, and the parties shall proceed on such plea as if the same were an answer deemed sufficient on the expiration of the said fourteen days.”

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and that the practice under the 19th General Order of the Court, bearing date the 29th of November 1834, as to the propriety of setting down such plea to be argued, or of having it referred to the Master, has not been previously decided—the Court, on motion of Mr. Collins as Counsel for the plaintiff, doth order, that notwithstanding the plea having been set down to be argued, it be referred to the Master to inquire and report whether this suit and the other suit now pending, as in said plea mentioned, are for one and the same matter.*

* See Barry and Keogh Ch. Pr. p. 220.

USHER v. SCANLAN and others.

May 1, 8.

Where a decree for a sale contains the usual direction that all proper and necessary parties shall join in conveying to the purchaser, if any of such parties bound by the decree and within the jurisdiction, afterwards refuses to execute the conveyance, he will be attached in the first instance; and the Court will not make an order that the Master shall execute in his name under the statute, until it appears that an attachment cannot induce him to execute *proprio manu*.

MR. DE MOLEYS, on behalf of the defendants Henry Mullins Mason and John Creagh, the parties having the carriage of the decree, moved that the Master might be at liberty to execute the deed of conveyance of the lands of Dromultonmore in the county of Kerry, to the purchaser under the decree, in the names and on the part of the plaintiff Thomas Usher, and of the defendant John Scanlan and of Nicholas Schollard, a reported creditor under the decree, pursuant to the 4 & 5 W. 4, c. 78, the said Usher, Scanlan, and Schollard having refused to execute the said deed of conveyance, and that the said Master might also be at liberty to execute the said deed in the name and on the part of the defendant Sarah Guion, pursuant to the 28 G. 3, c. 35, the said Sarah being resident in England, and having refused to execute the said deed.

The final decree contained the usual direction, that in case of a sale, all proper parties should join in a conveyance to the purchaser.

The plaintiff, Usher, was a mere trustee for the defendants H. M. Mason and J. Creagh, who were entitled to the whole beneficial interest in the judgment vested in him. Mason and Creagh had executed the deed of conveyance to the purchaser, but the plaintiff, their trustee, refused to do so unless they would give him a farm. Nicholas Schollard was not a party in the cause, but came in under the decree to account and was a reported creditor.* Sarah Guion was heiress-at-law and personal repre-

* As to creditors coming in and proving their demands under the decree, see *Fitzgerald v. Lane*, ante, 339; *Eyre v. Lynch*, ante, 194; *Hutchinson v. Freeman*, 4 My. & Cr. 490; *Shuttleworth v. Howarth*, *ibid.* 492.

sentative of the inheritor. Scanlan claimed to be entitled to some interest in the lands under certain deeds which were declared by the final decree to be fraudulent and void, but it was deemed proper to make him a party to the conveyance, in order to get rid of all future questions as to his claims. These several persons were served with the decree at the same time that the deed of conveyance as approved by the Master was tendered to them for execution, but they severally refused to execute it.

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MASTER OF THE ROLLS.

As to the party out of the jurisdiction, I shall give you the order as of course; but as to the persons within the jurisdiction who refuse to obey the decree to which they are parties, I must see, before I make an order that the Master shall execute in their names, that they cannot be induced to obey the decree and to execute *propria manu* when the process of the Court is put in force against them for their contempt. There cannot be a more idle or unmeaning practice than that which I regret to see growing into fashion, of parties refusing to join in conveying to the purchaser pursuant to the decree by which they are bound. By such refusal they are guilty of a high contempt, which exposes them to very serious consequences, while it cannot either avoid the sale or prevent whatever title may be in them from being conveyed to the purchaser. I have in every case, hitherto, made the party or parties whose contempt of the decree gave occasion to applications like the present, pay the costs of them*—hoping thereby to check the foolish practice of refusing to execute; but I now find that this rule was too lenient, and that another must be adopted. Although there can be no doubt that the execution by the Master under the statute would give a sufficient title, yet every *Nisi Prius* lawyer knows that such a conveyance is liable to this inconvenience, that whenever the purchaser may have occasion to prove his title, he must produce an attested copy of the order under which the Master executed, and shew that the proceedings were regular; whereas all this trouble and expense would be avoided if the parties had themselves executed the deed, as they were bound to do by the decree of this Court.

Let this motion stand over, and let the present applicants forthwith serve the parties who are within the jurisdiction and refuse to execute the conveyance to the purchaser pursuant to the decree, with notice, that at the sitting of the Court on this day week, an application will be made for an absolute order for an attachment against each of them, for not executing the deed as

* See *Clarke v. De Burgh*, ante, vol. 2, p. 19.

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ordered by the decree ; and let it be stated in the notice that it is served by order of the Court.

After service of the notice directed by the Court, Schollard immediately came in and executed the deed, but Usher and Scanlan still held out ; and upon production of an affidavit of the service upon them of the notice, the Master of the Rolls now made an absolute order for an attachment against them. His Honor said that this was the first time he had deemed it necessary to attach parties for not executing the conveyance to the purchaser pursuant to the decree ; but he desired the suitors and practitioners of the Court to understand that he would make a similar order in every like case.

In an hour or two after the order was pronounced, Scanlan appeared by Counsel, and gave an undertaking to execute the deed forthwith, and prayed that he might not be charged with the costs of the attachment motion, &c., but the Court would not let him off. The attachment issued against Usher.

MAGRATH v. HERON.

May 3.

After answer and before issue joined the plaintiff assigned all his right and interest in the subject-matter of the suit, but refused to allow the assignee to proceed in his name. On motion of the assignee for leave to amend the bill by striking out the name of the plaintiff and inserting his own instead: *He.d.*, that such amendment could not be allowed.

THE bill in this cause was filed by a mortgagee, after the mortgagor's death, for an account of the personal estate and a foreclosure, &c. A bill had previously been filed in the Court of Exchequer by a simple contract creditor of the mortgagor for an administration of assets, but none of the defendants answered in that suit. After the devisee had filed his answer in this cause, and before replication, the simple contract creditor obtained an assignment of the plaintiff's mortgage, &c., intending to discontinue the suit in the Exchequer ; the plaintiff, however, refused to allow this cause to be further prosecuted in his name.

A motion was now made on the part of the assignee for liberty to amend the bill by striking out the name of the original plaintiff, and inserting the name of the assignee as plaintiff.

Mr. *William Brooke*, Q. C., for the motion.—The object of the present application is to bring the assignee before the Court without the expense of a supplemental bill, as there can be no doubt that the fund will be very deficient. According to the English practice, every new fact occurring after the filing of the bill is supplemental matter, and it would be necessary in a case of this kind to file a supplemental bill ; but it is

clear that by such a proceeding the assignee should be enabled to carry on the cause. In Ireland, such new matter, occurring after the filing of the bill and before issue joined, as in England should be the subject of a supplemental bill, may be introduced by amendment of the original bill under the 51st Rule of November 1834; *Knox v. Knox* (a). Before the New Rules, and when the Chancery practice of the two countries was nearly the same, there was a class of cases in which matter that according to the strict rule should have been the subject of a supplemental bill was allowed to be introduced by way of amendment; and, perhaps, the present comes within the principle of those cases, *Franklin v. Bea-mish* (b); *Humphreys v. Humphreys* (c); *Moses v. Levi* (d).

Where the alteration intended is in the person or character of the plaintiff, there is a clear distinction between such as merely shifts the right of suit from one character or person to another, and such as would, by raising a title not previously in suit, affect the defendant with liability to which he was not subject by the bill: the former may, according to the English practice, be attained by supplemental bill, and in Ireland, as it is conceived, by amendment; but the latter alteration could not be effected by supplemental bill, nor perhaps should it be by amendment; although it is to be remembered that, by amendment, the plaintiff may make a wholly new case (e), whereas the supplemental bill should be strictly confined to matter supplemental to the case already made. It has been said in several of the English cases, and cannot be denied, that a party ought not to be allowed by means of a supplemental bill to entitle himself to the costs of previous proceedings which were instituted without right. But where the original bill is rightfully filed, and the plaintiff assigns his right, there is no question that, according to the English practice, the assignor and assignee may be made co-plaintiffs by supplemental bill, or, in other words (as one of several co-plaintiffs may be withdrawn from the record upon giving security for costs)—the assignee may by supplemental bill be made the plaintiff; and, considering the difference between the English and Irish practice, there seems to be no reason why the same thing may not here be done by amendment. So far as the defendants are concerned, the amendment which it is now sought to have made is merely formal: it is not to alter in the least degree the nature or the extent of the right on which the suit is founded, nor the liability with which it is thereby sought to charge the defendants, but simply to state the assignment from A. to B., and to insert B. instead of A.—of course giving security for by-gone costs on withdrawing the original plaintiff from

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(a) 2 Ir. Eq. Rep. 33.

(b) 1 Hog. 72.

(c) 3 P. Wms. 351.

(d) 3 Y. & Col. 366.

* But see *Walsh v. Studdart*, ante, vol. 2, p. 218.

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the record. *Brown v. Higden* (a); *Hayter v. Stapleton* (b); *Adams v. Dowding* (c); *Davidson v. Foley* (d); *Stubbs v. Leigh* (e); *Barfield v. Kelly* (f); *Pritchard v. Draper* (g); *Pilkingtion v. Wignall* (h); *Ryan v. Anderson* (i); *Smith v. Snow* (k); *Harrington v. Long* (l).

The defendants did not appear upon the motion.

May 6.

The MASTER OF THE ROLLS refused the application. His Honor said, that an original and amended bill are so completely one, it has been held that they must be addressed to the same Chancellor, although, at the time of filing the amended bill, a different person may have succeeded to the office. Then it is clear, upon authority, that at the hearing of a cause, the plaintiff must be prepared to shew he was entitled to the relief prayed at the time of filing the bill: *Davidson v. Foley*; *Pilkingtion v. Wignall*; *Barfield v. Kelly*; *Pritchard v. Draper*. In the present case, it was sought, by amendment, to make a person plaintiff who had no title when the principal defendant put in his answer, nor until upwards of six months after the filing of the bill, which had been subsequently amended. The further amendment now sought should, if allowed, render the statements in the bill inconsistent. The allowance of the amendment in *Humphreys v. Humphreys* (m), *Moses v. Levi* (n), and *Franklin v. Beamish* (o), did not infringe upon the principle of the decisions before mentioned; for the plaintiffs in those cases had a title, at the time of filing the bill, although they did not take out administration until afterwards; and it was held in those cases, that the grant of administration has, in Equity, relation back to the death of the intestate.*

Motion refused.

(a) 1 Atk. 291.

(c) 2 Madd. 53.

(e) 1 Cox, 133.

(g) 1 Russ. & My. 191, 198.

(i) 3 Madd. 174.

(l) 2 My. & K. 598.

(n) 3 Y. & Col. 366.

(b) 2 Atk. 137.

(d) 3 Bro. C. C. 598.

(f) 4 Russ. 355.

(h) 2 Madd. 240.

(k) 3 Madd. 10.

(m) 3 P. Wms. 351.

(o) 1 Hog. 72.

* That is, where the parties stood in such a relation to the deceased as gave them a right, having some resemblance to that of an executor before probate. But whether the grant of administration to a mere stranger should in Equity have such retrospective operation does not seem to have been decided. As to the rule at Law, see *Cum. Dig. tit. Administration* (B. 9.)

1841.

Rolls.

AHEARNE v. HARNEY and others.

May.

THE bill in this cause was filed against the Directors of the Norwich Union Life Insurance Society, for payment of the sum of £200 insured by one John Hogan, lately deceased, on his own life in the year 1836. The plaintiff had obtained an equitable assignment of the policy for valuable consideration; and was obliged to file the present bill, as Hogan's widow and administratrix had, as it was alleged, in consequence of the plaintiff's refusal to give her any portion of the sum insured, untruly represented to the Company's agent at Cork, that at the time the policy was effected Hogan was not an insurable life, and she further threatened to repudiate any action which might be brought in her name against the Company.

On a bill against the directors of an English Insurance Company for payment of the amount of a policy of insurance, service of the subpoena to appear and answer substituted on the Irish agent of the directors, it appearing that the contract, the subject-matter of the suit, was made in Ireland.

Mr. *McDermott*, for the plaintiff, now moved that service of the subpoena to appear and answer the bill might be substituted on Abraham Jones for the Directors of the Norwich Insurance Company, resident out of the jurisdiction, the said Jones being the Company's Agent resident at Cork. The plaintiff's affidavit to ground the motion stated that the policy of insurance was effected at Cork, through the agency and mainly at the suggestion of the said Abraham Jones.

MASTER OF THE ROLLS.

It appearing that the Company has a resident agent at Cork, and that the contract, the subject-matter of this suit, was effected there, take the order.*

* See *Moloney, executor of Casey, v. Tulloch and others*, Jones, 114.

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*Rolls.**April 26.*
May 3, 22.

VINCENT v. GOING.

A purchaser cannot be attached for not completing his purchase until after a report of good title has been obtained.

The purchaser of a life estate under a decree, having lodged one-fourth of the purchase money, served the rule *nisi* to confirm the sale on the 22nd of January. The eight days limited by the rule expired on the 3rd of Feb., and no cause was shewn. The tenant for life died on the 12th of Feb., and before the sale had been absolutely confirmed, or the remainder of the purchase-money had been paid in. The purchaser then refused to proceed, the estate having determined.

Held, that as the sale *might have been* confirmed, the purchaser, although not guilty of any unreasonable delay, was bound, provided a good title could have been made: the Court, therefore, refused his application for the one-fourth of the purchase-money lodged by him; and ordered, on the plaintiff's motion, that it should be referred to the Master to inquire, &c., whether a good title could have been made at the time of the sale, or at any and what time previous to the death of the tenant for life.

UNDER the decree in this cause, the life estate of the defendant Thomas Going in certain lands in the county of Tipperary, was set up to be sold on Saturday the 16th of January 1841, when Edward Lloyd, solicitor, bid £2000, and was declared the purchaser. On Monday the 18th, Mr. Lloyd (who had bid in trust for his client Caleb Going, the person entitled next in remainder after the defendant Thomas Going) obtained the Master's certificate of the sale; on Tuesday the 19th, he bespoke the certificate to lodge the one-fourth of the purchase-money; on Wednesday the 20th, he obtained the certificate; and on Thursday the 21st, the one-fourth was lodged. On the next day, he obtained the usual rule confirming the sale unless cause in eight clear days after service; and this rule was served on the solicitors of the several parties in the cause on Saturday the 23rd of January. The eight days limited by the rule expired on Wednesday the 3rd of February. On the 4th of February, Mr. Lloyd bespoke the order for liberty to lodge the remaining three-fourths of the purchase-money; he got it next day, and, on Saturday the 6th of February, lodged it with the Accountant General, and on Monday the 8th, obtained the Accountant General's certificate of liberty to lodge. Before any further step was taken, the defendant Thomas Going died on the 12th of February. The purchaser then refused to proceed, under the circumstances, to confirm the sale, or lodge the remainder of the purchase-money.

The purchaser having refused to complete his purchase, the plaintiff moved (April 26th) for an attachment against him, but the motion was refused with costs, as a report of good title had not been obtained (a). The plaintiff then served a new notice, and now (May 3rd) moved for a reference to the Master to inquire and report whether a good and sufficient title could have been made on the 3rd day of February last, being the day on which the sale could have been confirmed. At the same time Counsel on behalf of Mr. Lloyd moved on cross notice, that the Accountant General might draw in his favour for £500, being the one-fourth of the purchase money lodged by him.

The Court, therefore, refused his application for the one-fourth of the purchase-money lodged by him; and ordered, on the plaintiff's motion, that it should be referred to the Master to inquire, &c., whether a good title could have been made at the time of the sale, or at any and what time previous to the death of the tenant for life.

(a) See *Dick v. Barrett*, 1 Hog. 351. As to a solicitor bidding in trust for his client, See *Studderts, minors*, 1 Hog. 320; *Hobhouse v. Hamilton*, id. 401.

Mr. *Blackburne*, Q. C. and Mr. *Rollestone*, for the plaintiff.—When the Master shall have reported that a good title could have been made, the purchaser can be compelled to pay in the remainder of the purchase-money: the rule in *Hobhouse v. Hamilton* (a), as to forfeiting the deposit, applies only where there can be a resale. The destruction or deterioration of the thing sold only raises the question, at what time was the contract complete?—if incomplete, when the loss happened, the vendor or estate must be the loser; but if complete, the loss is that of the purchaser. In the present case, on the 22nd of January the Court ordered that the sale should be confirmed unless cause in eight days after service of the order. The eight days expired on the 3rd of February, and no cause having been shewn, the bidding was then accepted by the Court, and both the purchaser and the estate bound by the contract. On that day, or the day after, the purchaser might and ought to have paid in the remainder of the purchase-money, and to have made the rule *nisi* absolute; and this Court, regarding that as done which ought to have been done, gives effect to a contract from that time at which it ought to have been performed: *Paine v. Meller* (b); *Jackson v. Lever* (c); *Twigg v. Field* (d); *Sewell, qui tam, v. Johnson* (e); *Revell v. Hussey* (f); *Hutchinson v. Cathcart* (g). Although in ordinary transactions mutuality is essential to a contract, that rule does not apply to a judicial sale, in which, unless it appears that the thing set up to be sold cannot be conveyed for want of title, the purchaser is bound by and from the time of his bidding, although the estate is not bound until the bidding is accepted by the Court. There is also a distinction between the sale of estates certain and of estates uncertain in their nature: as to the former, the time from which the purchaser is to be entitled to the profit of the estate, or liable to any loss accruing to it, is ascertained by, and has a settled relation to the time at which the remainder of the purchase-money has been paid in, and to the date of the order confirming the sale: *Gowan v. Tighe* (h); *Prendergast v. Eyre* (i). In the last-mentioned case, it was held that after payment of the entire purchase-money, the purchaser is entitled to the profits of the estate from the gale day preceding the payment, without reference to the date of the order confirming the sale; and if entitled to the profits, he must be equally liable to the loss. However, as to the sale of estates or interests uncertain in their nature, it has been

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(a) 1 Hog. 401; and see *Sugd. V. & P.* (8th ed.) p. 65.

(b) 6 Ves. 349.

(c) 3 Bro. Ch. Ca. 604.

(d) 13 Ves. 517.

(e) Bunb. 79.

(f) 2 Boll & B. 287.

(g) 1 Ir. Eq. Rep. 452.

(h) Ll. & G., *temp.* Plunk. 168; S. C. 4 Law Rec. N. S. 65.

(i) Ll. & G., *temp.* Plunk. 180; S. C. 4 Law Rec. N. S. 149.

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expressly decided, that although the purchaser cannot go into possession until after the sale has been confirmed, he is entitled to whatever the profits may be, and liable to any loss by reason of the estate from and after the moment of his bidding: *Anson v. Towgood* (a); 1 *Sugd. V. & P.* 140; *Sanders v. Grey* (b). Here the real purchaser is Mr. Caleb Going, who now goes into possession as next in remainder after the late defendant Thomas Going; he therefore has nothing to complain of, if he can be held to his purchase. On the other hand, the purchase-money is the principal, if not the only fund for payment of several needy creditors now before the Court.

Mr. Smith, Q. C., Mr. Collins, Q. C., and Mr. W. Lloyd, for the purchaser.—There is no pretence for saying that the purchaser in this case was guilty of any unreasonable delay: in fact, he was proceeding with unusual dispatch to confirm the sale, until a day or two before the subject-matter of it determined by the death of the tenant for life: and if, when he heard that the tenant for life was at the point of death, he stayed his hand, it was but just and reasonable that he should do so. Therefore, in so far as the plaintiff's application rests upon the supposed default of the purchaser, it fails utterly; and the simple question is—whether a person bidding at a judicial sale thereby becomes liable to any loss that may befall the estate before the sale is confirmed? No authority has been cited, or can be, in support of the affirmative of that question, except the single decision in *Anson v. Towgood* (a), which is opposed to the current of authorities, and has been observed upon in *Atkinson's Essay on Marketable Titles* (c), as being utterly inconsistent with his Lordship's previous and more considered decision in *Ex parte Minor* (d), and the general current of authorities: *Mackrell v. Hunt* (e); *Anon.* (f). In *Gowan v. Tighe* (g), Lord Plunket had occasion to consider the same question, and he decided that “the contract is not completed until the confirmation by the Court of the Master's report declaring the highest bidder.”

[MASTER OF THE ROLLS.—The question in that case was as to the time from which the purchaser was entitled to the profits; and there, it was decided that the purchaser is entitled to the profits from the gale day next preceding the lodgment of the remaining three-fourths of the purchase-money. But in *Prendergast v. Eyre* (h), the Chancellor went a step further, and held that the purchaser is entitled to the profits from

(a) 1 Jac. & W. 637.

(c) pp. 265, 265-6.

(e) 2 Madd. 35, n.

(g) Ll. & G. temp. Plunk. 175.

(b) Newl. C. P. 544.

(d) 11 Ves. 561.

(f) 2 Ves. jun. 335.

(h) Ll. & G. temp. Plunk. 180.

the gale day next preceding the payment of the whole purchase-money, even though the sale may not have been absolutely confirmed for six or nine months after the purchase-money was paid in.]

It is to be remembered, that the question as to the time from which the purchaser is entitled to the profits, can never arise until after the sale has been absolutely confirmed; and as, according to the Irish practice, the payment of the purchase-money must precede the confirmation of the sale, it seems but reasonable that the time from which the purchaser is to be entitled to the profits shall have reference not to the confirmation of the sale but the payment of the price. *Gowan v. Tighe*, and *Prendergast v. Eyre* are quite consistent. *Paine v. Meller* (a), and that class of cases have no application to the present. The question here is, when is the contract upon a judicial sale complete? No doubt, after the sale has taken place the purchaser is liable to the risks of the estate, but until the proceedings in the office have been confirmed absolutely by the Court, the biddings may be opened at any time, and no sale has taken place; *Vansittart v. Collier* (b). If the purchaser is dilatory, the vendor or party having the carriage of the decree may compel him to proceed.

MASTER OF THE ROLLS.

This case raises a question upon the practice of judicial sales in this Court, of importance not only to the parties immediately concerned in the present motion, but also to the public.—[His Honor here referred to the proceedings in the office and the dates of them, as already stated.]—The 3rd of February being the last day of the eight days limited by the rule *nisi* confirming the sale, and no cause having been shewn, the plaintiff insists that the sale may have been absolutely confirmed on the following or any subsequent day, and that the purchaser should be held liable from the time at which the rule *nisi* might have been made absolute; and accordingly, that as the estate did not terminate until the 12th of February, the purchaser should now be compelled to complete his purchase, provided it appears upon a reference to the Master that a good and sufficient title could have been made. On the other hand, Mr. Lloyd, who it appears purchased in trust for his client Mr. Caleb Going (though the trust was not declared at the time of the sale), insists that as on the 12th of February when the tenant for life died, the rule *nisi* confirming the sale had not been made absolute, there was not then any existing contract which bound him to the estate, and that as the estate for which he bid, and was willing to purchase, no longer exists, he is now entitled to be paid back the sum lodged by him, being the one-fourth of the purchase-money, which, according to the practice of this Court,

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(a) 6 Ves. 449,

(b) 2 Sim. & Stu. 608.

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a party bidding in the office must lodge before he can be entitled to obtain the rule *nisi* to confirm the sale.

I have detained this case for consideration somewhat longer than usual, as I do not remember having ever before met with such another. However, I hope it will be found that the principles of my decision upon it are well established.

A considerable difference exists between the English and Irish Chancery practice respecting the confirmation of judicial sales. As my decision must have regard to *our* practice, it is right to observe what it is, although I am very far from saying that it would not be proper, upon a revision of it, to make considerable alterations:—Upon a sale under a decree of this Court, due notice having been given, the persons desiring to purchase attend at the time appointed in the Master's office, where their biddings are taken and entered in the Master's book. The person who is declared highest bidder obtains from the Master what in England is called a report, but in this country a *certificate* of the proceedings in the office, and of his being the highest bidder. This certificate is necessary to enable the bidder to proceed to have the sale confirmed; and having obtained it, his next step must be to lodge one-fourth of the purchase-money with the privity of the Accountant-General. He is then entitled as of course to a conditional order, which is a side-bar rule, for confirmation of the sale, unless in eight days after service cause shall have been shewn against it. The sale cannot be confirmed absolutely until the remaining three-fourths of the purchase-money have been lodged; but if no cause is shewn against the rule *nisi* within the time limited, the purchaser, upon lodging the remaining three-fourths, is entitled immediately and as of course, after the expiration of the eight days given for shewing cause, to have the sale absolutely confirmed, which is done by another side-bar rule.

I am not now called on to decide upon the merits or demerits of the rule requiring the entire purchase-money to be paid before the sale can be confirmed; but I may observe, that such is not the rule in England, nor in the Court of Exchequer in this country. Such, however, being the rule of this Court, the Lord Chancellor has decided that the purchaser is entitled to the profits of the estate from the gale day next preceding the lodgment of the remaining three-fourths of the purchase-money, even though the sale be not confirmed within the current gale: *Gowan v. Tighe*; *Prendergast v. Eyre*. Soon after those decisions, cases occurred in which, the sale being had just as a gale was falling due, the purchaser immediately lodged the one-fourth of the purchase-money, and in a day or two afterwards—being the gale day—lodged the remaining three-fourths, and thereby became entitled as of course to the rents for a period of six months, during which he had the

use and interest of the purchase-money also (a). As this was, to say the least of it, a great hardship to the inheritor of the estate and the persons entitled under the decree, for whom there was, perhaps, a scanty fund ;— and as the purchaser is not required to lodge the remaining three-fourths of the purchase-money until the time limited by the rule *nisi* has run out,—directions were given to the Registrar not to comply with the requisition for the order to lodge the remaining three-fourths of the purchase-money until after the eight days had expired, in any case in which the gale of rent would fall due before the expiration of those days. But it must be confessed that the protection thus afforded to the estate is of very limited application ; and it appears to me that although it is in general true that the purchaser's contract is not complete until the sale is absolutely confirmed, yet, as according to the practice of this Court, his right to the profit does not depend upon and may precede the completion of the contract, so also, in certain cases, may his liability to the risks of the estate.

In England, the sale is confirmed absolutely before any portion of the purchase-money is payable, nor need the money be paid until a report of good title has been obtained. The rule as to the purchaser's right to the profits is stated to be, that as to estates in possession, the purchaser is entitled to the rents from the quarter day preceding the payment of the purchase-money (b) ; but whether he be entitled to the profits or not, the estate is his from the moment the sale is absolutely confirmed, and he is liable to any loss that may befall it (c). It is his duty as soon as conveniently may be after the sale to obtain the Master's report and move that it may be confirmed ; and if, having obtained the rule *nisi*, he delays to make it absolute, the party having the carriage of the decree may do so in his stead ; *Chillingworth v. Chillingworth* (d). Thus the purchaser cannot postpone his liability to the risks of the estate, although he may postpone, if he think fit, his right to the profits of it. But according to our practice, the entire purchase-money must be paid before the sale can be confirmed, and consequently the completion of the contract depends upon the diligence and *bona fides* of the purchaser. If he is dilatory, or does not choose to pay in the entire of the purchase-money, the parties in the cause cannot proceed to confirm the sale, nor move that he may forfeit his deposit, nor can they proceed to compel him to confirm the sale, until after a reference to the Master and a report of good title has been obtained.

In *Kirwan v. Blake* (e), the late Master of the Rolls stated at length

(a) See *Scott v. Rothe* (the sale of a life estate) 1 Ir. Eq. Rep. 105 ; S. C. Cr. & Dix, 621.

(b) See Sugd. V. & P. (8th ed.), 55, 508-9.

(c) See *Ackland v. Gainsford*, 2 Madd. 32.

(d) 1 Sim. 291.

(e) 1 Hog. 159.

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the Irish Chancery practice as to judicial sales; and the first rule stated by him is "that the bidding binds the bidder, while it is open to the Court "to receive an outbidding and to order a resale, until the conditional "order to confirm the sale, which is an eight-day rule, has been made "absolute:" he then goes on to state the rules already mentioned as to the payment of the purchase-money before the sale can be confirmed. This raises a very important distinction between sales by auction, or private contract, in which the vendor and purchaser are bound at the same time, and judicial sales on which the purchaser is bound and must pay the purchase-money before the vendor or estate is bound, and there is not mutuality in the contract. Observing, then, that in judicial sales there is not mutuality, I proceed to consider whether or not, upon the facts of this case, Mr. Lloyd should be considered to have been the purchaser, and liable to the risks and losses of the estate, on or before the 12th of February, when it became extinct.

I do not think that any imputation can be fairly thrown upon the purchaser's conduct: he was proceeding to complete his purchase with reasonable despatch, until he was apprised of the dangerous sickness of the gentleman on whose life the estate depended, and it was very natural for him to pause a little until the probable issue of that sickness should be known. But on the other hand, on the 3rd of February—nine days before the estate was terminated—the rule confirming the sale *nisi* had run out; perhaps on the following day, the sale *might* have been confirmed absolutely, had the purchaser been so minded; but, beyond all question, it might have been, on the 8th of February: for on that day the purchaser had taken out the order to lodge the remaining three-fourths of the purchase-money and had obtained the Accountant-General's certificate upon that order, and there remained nothing to be done but to lodge the money and enter the side-bar rule, making absolute the confirmation of the sale. I am therefore of opinion that, upon the grounds already stated, I must hold the purchaser to have been bound, and liable to the risks and losses of the estate from that day.

It has been said, that as the sale was not absolutely confirmed, when the estate terminated, the loss should not fall upon the purchaser, and for that proposition several authorities have been cited; but from the difference already noticed between the English and Irish Chancery practice, it must be obvious that few, if any, of the English decisions could be properly applicable to the present question. In the case of *Ex parte Minor* (a), a house and offices, part of the estate of a lunatic, were sold before the Master on the 9th of February. On the 26th, a petition was presented by the person reported highest bidder, that the report might be confirmed; and on the 28th, before any order had been made

(a) 11 Ves. 561.

on the petition, part of the offices, which were uninsured, were destroyed by fire. The question was, upon whom should the loss fall—the vendor or the purchaser?—and Lord Eldon held, that the loss being before confirmation of the report, should be borne by the estate of the lunatic. That case is distinguishable from the present. There, the sale had not been conditionally confirmed, and besides, it was not a case of an *uncertain* estate. In *Twigg v. Tysfield* (a), an annuity secured by bond and payable quarterly, was sold before the Master on the 11th of August, and the report was confirmed in the following Michaelmas Term. The purchaser then moved for leave to pay his purchase-money into bank, and to receive the annuity from the 5th July, being the quarter day next preceding the sale before the Master: and the question was, from what time he was entitled to receive it. Lord Eldon said, “In a late case”—alluding to *Ex parte Minor*—“where part of the premises were burned, I considered the purchaser as having the purchase from the confirmation of the report. “That I think the reasonable rule for this case; and that the purchaser “should pay interest from the very day on which he *could have* confirmed the report.” It is there said that the purchaser was liable from the very day on which he could have confirmed the report; but I do not think that either of those cases has much resemblance to the present.

Anson v. Towgood (b) is more like. That was the case of a sale before the Master of a life interest in stock, the life being that of a person aged sixty-seven years. The sale took place on the 4th of July, and on the day after, one half-year’s dividends became due. On the 8th, the Master reported the purchase, and on the 31st of the same month, the purchaser, having obtained the absolute confirmation of the report, and paid in the purchase-money, moved on petition that the half-year’s dividends due the day after the sale, and afterwards brought into Court, might then be paid to him. Lord Eldon granted the petition, and said, “The rule of the Court in the purchase of a *fee-simple* estate is, to give “the profits from the quarter day preceding the payment of the purchase-money; but is that so where a man buys a *life estate* which may not last “five minutes?” Again, he says, “Can any thing turn upon the report not “being confirmed? There was a case about a house being burned down “before the confirmation of the report; *but if the tenant for life had died “the same night, must not the purchase-money have been paid?* The report, I think, when confirmed, must have relation back to the purchase, “and the contract, I apprehend, was made the moment that the purchaser’s “name was entered in the Master’s book. If the tenant for life had lived till “6th of July and then died, the purchaser could have had nothing if he “is not entitled to these dividends.” In Sir Edward Sugden’s work on

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(a) 13 Ves. 517.

(b) 1 Jac. & W. 637.

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Vendors and Purchasers (a) it is laid down that "if a life interest in stock be sold, the purchaser is entitled to the dividend which becomes due after the sale, although it falls due the very day after;" and the authority of *Anson v. Towgood* is cited.

If then the purchaser of an uncertain interest—which, at the time of his bidding he knows, 'may not last five minutes'—is so entitled to the profits falling due the very day after the sale and before the Master's report of it is made, there seems to be the strongest reason for contending that his risk attaches at as early a period, and that although the tenant for life had died the same night (so that there should have been no profit) still the purchase-money must have been paid. I must, therefore, refuse the purchaser's motion for the three-fourths of the purchase-money lodged by him, and make the order of reference sought by the plaintiff. The order will, perhaps, press severely on the gentleman for whom, as it now appears, Mr. Lloyd bid in trust, and I regret it very much; but the question was one in which the creditors of the estate for whom there is a deficient fund, were no less interested than the purchaser; I was bound to consider it strictly, and was not at liberty to shew any favour on the one side which could prejudice the rights upon the other. I may state, also, that the grounds of my decision are altogether independent of what was said upon the motion, but does not appear upon any of the documents before me, namely, that the gentleman on whose behalf the purchase was made, was the person entitled next in remainder; and that being son of the tenant for life, and living with him, he had special means of knowing at the time of the purchase what was the probable value of the life upon which the estate depended. I have treated the case as if Mr. Lloyd was solely interested in the purchase; and it may be observed that this is not like the case of a bill for specific performance of an agreement, in which the Court can go into the question of consideration, and inquire how far was the contract conscientious. This is a naked question of liability arising between the parties and under the circumstances already stated, and if the Court should refuse to enforce Mr. Lloyd's bidding there would be no remedy at law. I have therefore felt coerced to decide as already mentioned; but I will add, that the decision is not satisfactory to my own feelings, and I hope there will be an appeal.

ORDER:—Refuse the purchaser's motion without costs; and on the plaintiff's motion, let it be referred to the Master to inquire and report whether a good and sufficient title to the estate for life of the late Thomas Going in and to the towns and lands of,

(a) 9th ed. 1 vol. 104.

&c., could have been made and given to the said Edward Lloyd, who is by the Master's certificate bearing date the 18th of January 1841, stated to have been the best bidder for such estate for life at the sale thereof before the said Master on the 16th of January 1841, at the time of such sale to him, or at any other and what period previous to the death of the said Thomas Going; and the Court doth reserve the consideration of any further order to be made in relation to the discharge of the said Edward Lloyd from his bidding, and also of the costs of the reference hereby directed, until the Master shall have made his report.*

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*.The above order was reversed upon appeal by Lord Chancellor Plunket, on Saturday, 19th June 1841; when it was further ordered, that "the said Edward Lloyd be released from his bidding, *the said Thomas Going having died before the said sale was confirmed*; and that the Accountant-General do transfer to the said E. Lloyd so much of the Government 3½ per cent. stock in bank to the credit of the cause as shall, with the approbation of the Master, be equivalent to £500, being the sum lodged," &c. This appeal was the last case of general interest upon which his Lordship adjudicated in the Court of Chancery; and after reversing the order of the Master of the Rolls, he is said to have observed—alluding to his successor, who was expected to take his seat in a few days—that the parties would have the opportunity of having the case re-heard immediately, if they pleased; but the Reporter has heard that it is not likely to be carried further, in consequence of some objections to the title, which might be fatal if insisted on.

It is obvious, that the anomaly which requires the purchase-money to be paid before a sale can be properly said to have taken place, has involved the practice upon judicial sales in this country in enormous difficulty and confusion. The intention of it may be supposed to have been to prevent the administration of justice from being trifled with, and to give security to judicial sales; and it may be admitted that, from the nature and character of such sales, attempts have been and will continue to be made from time to time, to delay and frustrate them if possible. But such attempts are as likely to be made in England as in this country, and the difference in the Chancery practice suggests a distinction between English and Irish morals which, it is to be hoped, would be found on examination to be as unjust as it is offensive. Whatever may have been the intention of the Irish rule, few practical men will be found to deny that its effect has been not to restrain fraud, but to encourage it. In the Court of Exchequer, only one-fourth of the purchase-money is required before the sale is confirmed absolutely, and the sales in that Court are not a whit more insecure than in Chancery; on the contrary, they are more secure: for in the Exchequer, *Chillingworth v. Chillingworth*, 1 Sim. 291, would apply; and had the case above reported occurred in that Court, the purchaser might have been bound beyond all controversy. As to impostors, without either character or property to lose, pawning themselves as bidders at judicial sales, the rule, as to payment of the whole or any part of the purchase-money before confirmation, can have no application at all; and the course of the Court in such a case is as if no such rule existed: *Willett v. O'Flaherty*, 6 Law Rec., N. S., 215; *Eyre v. Lynch*, *ib.* 217, n. In truth the insisting upon payment of any part of the purchase-money before the sale—on performance before the contract—involves the subsequent proceedings of the Court in serious difficulties of principle, when the question arises as to the time

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from which the purchaser is to be entitled to the profits: *Montgomery v. Coplett*, 4 Law Rec., N.S., 213; S. C. 2 Jones, 177; but see the observations of Pennefather, B., in *Vincent v. Thoaites*, 2 Ir. Eq. R. p. 427; and see further, 2 P. Wms. 412; 2 Madd. 34, n.: 13 Ves. 518; 1. Ves. jun. 94; 10 Ves. 505; 14 Ves. 591; 2 Cox, 231.

In *Kirwan v. Blake*, 1 Hog. 160, the late Master of the Rolls laid it down—"Sixthly, 'that when the purchaser pays in his purchase-money between any two gale days, he thus acquires a right to the rents from the gale day previous to the lodgment, if the purchase be completed within one current gale from the bidding.'" This condition may be very reasonable in the abstract, or in a sound state of the practice; but, where is the equity of it in a case in which the Court exacts the whole of the purchase-money before it will allow the sale to be confirmed? There does not seem to be any equity or reason for it in such a case, and so thought Lord Plunket in *Prendergast v. Eyre*. Nothing short of that decision, as it is conceived, could have been justice to the purchaser upon the present state of the practice; it is a mere acknowledgment of the rule, which, however objectionable in principle must be respected while it continues to be the law of the Court;—the rule, which in effect insists that a man shall have been purchaser before the sale. The decision of the Master of the Rolls in the principal case is expressly and necessarily grounded upon the existing state of the practice in Ireland; and when regard is had to the facts—that, before the estate terminated, the time limited by the rule confirming the sale *nisi* had run out; that when the eight days expired, it was the right, and duty of the purchaser to have proceeded without any loss of time to have lodged the remainder of the purchase-money, and confirmed the sale; that the sale might have been confirmed, but was not, because the purchaser delayed; and that when he paused, no one else could proceed,—it certainly is not easy to perceive how his Honor's decision could be reversed without pulling down the authority of Lord Plunket's decision in *Prendergast v. Eyre*. However, the Reporter is not aware of Lord Plunket's reasonings upon the subject.

It would be a mistake, it is apprehended, to understand the decision of the Master of the Rolls as grounded, in any degree, upon the questionable authority of *Anson v. Tougood*: for his Honor had announced his decision and the grounds of it, before he adverted to any of the English cases. In the report of *Anson v. Tougood*, it is stated, that "In the particulars of sale, the lots were described as 'The life interest 'of James Strange, Esq., aged sixty-seven years, whose life is insurable in — '£.—,' &c., and no mention was made of the time from which the purchaser 'was to receive the dividends; but at the time of the sale it was stated, that the 'dividends to become due the following day would be the property of the purchaser.'" It could scarcely be successfully contended that this was not a fact of high importance in the case; and it may be true of this, as has been observed of other decisions of Lord Eldon, that the order was critically fitted to the case, although the general observations of the Court were liable to objection. If, however, the facts above mentioned be not sufficient to warrant the granting of the petition in *Anson v. Tougood*, it may at least be doubted that the decision could be justified by the supposed distinction between a fee-simple and a life estate. An estate, and the beneficial interest in it, are very distinct and different things; the estate may be unchanging and for ever, and the beneficial interest in it constantly fluctuating. While Lord Eldon speaks of the fee-simple estate and the life estate, it would seem from the latter paragraph of his judgment, that what was in his mind was an idea of the fixedness and permanence of the fee-simple estate and the utterly uncertain and perishing nature of the life interest. If he had compared the beneficial interest in the two estates, the distinction would not hold. The uncertainty of the beneficial interest applies in degree to every estate: in a few weeks, or days, accidental causes might greatly increase or reduce almost to nothing the marketable value of the fee-simple. A life estate, it is true,

'may not last five minutes;' but how does it differ in that respect, so far as the real question is concerned, from property which may be burned or otherwise destroyed within as short a period, though the legal title to it may be for a term certain? Both interests are alike uncertain, and unless the special facts in *Anson v. Towgood*, before adverted to, and also the circumstance—which may have been a persuasive one—of the purchaser being, as it would seem from his name, one of the family of the person whose life interest was sold, can distinguish that case, it is plain that *Anson v. Towgood* and *Ex parte Minor* cannot stand together. *Ex parte Minor* was decided in the year 1805; Lord Eldon held it over for consideration, and it is impossible to resist the force and clearness of his reasoning in it. *Twigg v. Fifield* was in 1807, and it is remarkable with what accuracy in that case he stated and carried out the principle of his former decision. *Anson v. Towgood* was in 1820, and although he again adverts to the decision in *Ex parte Minor*, which does not appear to have been cited on the motion, it seems as if his recollection of it was very imperfect: for he must otherwise have seen that the reasoning upon which the decision in that case was grounded should have been a complete answer to his question, "If the tenant for life had died the same night, must not the purchase-money have been paid?" According to his reasoning in *Ex parte Minor*, it certainly should not.

As to mutuality of contract, it may be observed that there is not mutuality in the inception of any contract: there must first be a proposal, and until that proposal is accepted there is not mutuality. But whether the contract upon a judicial sale in England differs from a private contract, or a bidder in the office before a Master from a bidder in a common auction room, in any other respect than that there is in the one case, necessarily, a little longer interval between the proposal and the acceptance of it than need be in the other, perhaps deserves consideration. Even as to the Irish practice, see *Fergus v. Gore*, 1 Sch. & Lef. 850; and *Alben v. Bond*, ante p. 367; and see the fourth rule stated in *Kirwan v. Blake*, 1 Hog. 160.

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LANGLEY v. AYLMER.
SPILLER v. MELLIFONT.

May 1.

(*Equity Exchequer.*)

A distraining order will not be granted, unless it appear by affidavit that the receiver personally demanded the rent to be distrained for, from the tenants: but it is not necessary that the affidavit should state in terms, that he personally demanded the rent, if it state facts from whence it appears to the Court that the demand was personally made.

In the first of these causes, Mr. *Ferguson* moved, on behalf of the receiver, for liberty to distrain certain tenants in the affidavit mentioned. The affidavit of the receiver stated that more than a year's rent was due from each of the tenants; and that he, "on the 2nd of April last, "demanded the rent so due from the tenants (naming them) in the town "of Rathkeale;" but did not state in terms that he personally demanded the rent from them.

RICHARDS, B.,*

Held that the affidavit was sufficient, and granted the application.

In the second of these causes, Mr. *J. S. Townsend* made a similar application, upon an affidavit which stated that he (the receiver) demanded the rent from the tenants; not stating that he had personally demanded it, or where he had demanded it.

RICHARDS, B.,*

Held that the affidavit was insufficient, as the demand might have been by an agent, or by letter; and refused to make any order upon the motion.

* *Solus.*

May 10.

• CARR, *Petitioner*; AUSTIN, *Respondent*.

An absolute order for the appointment of a receiver on a judgment under the 5 & 6 W. 4, c. 55, which has not been acted on for more than a year, will not be renewed, unless it appear that the judgment has been revived within the year previous to the application.

MR. SPROULE, for the petitioner, moved, without notice, to renew an order made in this matter, and bearing date the 4th of December 1839. It was an absolute order for the appointment of a receiver upon a judgment under the 5 & 6 W. 4, c. 55. It was alleged that the respondent had been out of the jurisdiction of the Court; and that it had been found impossible to proceed in the office upon the order, until Hilary Term 1841. At that time the order was more than a year old, and the Remembrancer declined to act under it.

The COURT* inquired when the judgment had been revived; and upon being informed that it had not been revived since the conditional order for the appointment of the receiver had been granted, said it had been ruled that the judgment must be revived within the year previous to the application; otherwise the order for the appointment of the receiver would not be renewed.

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No rule.

* Richards, B., *solus*.

— v. HENRY.

THE bill in this cause was filed by the grantee of an annuity charged upon the estate of the defendant, the grantor, to raise the arrears thereof, and for a receiver. It appeared that after the bill had been filed, a person who had a charge upon the annuity filed a bill against the grantor and grantee, to raise the amount of his charge. A decree was pronounced in the first cause; and the plaintiff in the second cause was restrained from proceeding in it, liberty being given to him to prove his demand and costs under the decree in the first cause.

May 10.
The costs of encumbrancers upon a fund charged upon an estate, are to be borne not by the estate, but by the fund.

It was now sought by the plaintiff in the first cause, that the costs of the plaintiff in the second cause should be borne by the estate. *Sed per*

PENNEFATHER, B.

It is the constant course of the Court that the costs of encumbrancers upon a fund charged upon an estate should not come out of the estate, but out of the fund. They are occasioned by the act of the owner of the fund, and not of the owner of the estate.

It was decreed that the estate should only be charged with the costs of the suit to raise the arrears of the annuity: and that the costs of the second suit should be borne by the annuity, and not by the estate.

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Equity Exch.

May 10.

BAGGE v. —.

One of several *cestui que trusts* of a fund charged upon land, filed a bill against the owners of the estate, the other *cestui que trusts* and the trustees (who had refused to act), to raise its amount and for payment thereof to the persons entitled. *Held*, that the suit being for the benefit of all the *cestui que trusts*, they were bound to contribute in proportion to their shares to the difference between the taxed costs between party and party, and the plaintiff's costs of suit taxed as if he were the trustee of the fund.

THE bill in this cause was filed by the plaintiff, who was one of the *cestui que trusts* of a sum of money charged upon land, against the person whose estate the fund was charged, and also against the trustees and the other *cestui que trusts* thereof. The object of the suit was to raise the amount of the charge, and for payment of it to the plaintiff and the other *cestui que trusts* according to their rights thereto. The trustees had refused to act in the trusts.

Upon the cause coming on to be heard upon report and merits it appeared that the plaintiff and the other *cestui que trusts* were entitled to the fund in equal shares; each to one-seventh part thereof: and a decree was made for payment of it accordingly, with costs.

Mr. Warren, Q. C., for the plaintiff, then applied to the Court for a declaration in the decree, that the defendants, the other *cestui que trusts*, should contribute to the difference between the plaintiff's costs as between attorney and client and party and party, in proportion to their shares. The suit was necessary, and for the benefit of all the *cestui que trusts*.

PENNEFATHER, B.

If this bill had been filed by the trustee, he would have been decreed his *extra* costs out of the fund; and therefore the plaintiff, being placed in the situation of the trustee by reason of the latter having renounced the trusts, and having realised the fund for the benefit of all the *cestui que trusts*, ought to get the same costs as the trustee would have received. Therefore, we will add to the decree a direction, that in taxing the plaintiff's costs, the Officer do tax such costs as have been properly and necessarily incurred by him, and in the same manner as if he were taxing the costs of a trustee or personal representative; and that the *cestui que trusts* do contribute to the difference between such costs and the costs between party and party in proportion to their shares in the fund.

SCULLY v. SCULLY.

May 11.

The devisee of the equity of redemption in trust for other persons, is a necessary party to a foreclosure suit.

THE bill was filed to foreclose a mortgage in fee. After the execution of the mortgage, the mortgagor devised the equity of redemption to two trustees, upon trust to sell and to divide the produce amongst his three sisters, one of whom was a married woman; but there was no trust for her separate use. The trustees for sale were made parties to the suit.

Upon the cause coming on to be heard upon report and merits,
 Mr. *Collins*, Q. C., for the inheritor, objected that the trustees were not necessary parties, and were not entitled to costs against him. He cited *Head v. Teynham* (a).

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Equity Exch.
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 SCULLY.

PENNEFATHER, B.

An equity of redemption is considered as an estate in a Court of Equity; and, therefore, the devisee of it must be brought before the Court, although he holds it in trust for another. I do not see how title to the estates could be made out if the devisees were not made parties to the suit.

(a) 1 Cox, 57.

HUGHES v. NASH.

By the marriage settlement of the plaintiff's father, a term of 500 years was created in certain lands, the trusts of which were to raise portions for the younger children of the marriage. Subject to this term, the lands were limited to the first and other sons of the marriage in tail male. The plaintiff was the eldest son of the marriage; and the value of the settled estate being less than the amount of the younger children's portions, he, after his father's decease, filed the present bill against his brothers and sisters, stating that the fund was insufficient, and praying for a sale of the term and payment of their portions to the younger children. He adopted this course for the purpose of being paid his costs of suit out of the produce of the suit, in priority to the portions.

The cause now coming on to be heard on report and merits,

Mr. *Collins*, Q. C., and Mr. *B. Lloyd*, for the plaintiff, applied that he should be paid his costs in the first instance out of the funds; and cited *Head v. Massey* (a).

PENNEFATHER, B.

It must be a very special case which will entitle a *puisne* creditor to be paid his costs in preference to a prior creditor; *a multo fortiori*, it must be a very special case which will entitle a debtor to be paid his costs in priority to the demands of his creditor. The creditors, if they please, may call on the debtor to file a bill for their benefit, and agree that he

May 11.
 The value of a settled estate being less than the sum charged thereon for younger children's portions, the inheritor filed a bill against the younger children for a sale of the estate; and at the final hearing asked for his costs in priority to their demands:—
Held, that in the absence of any agreement to that effect, he was not entitled to them.

Head v. Massey, 2 Moll. 467, is not law.

(a) 2 Moll. 467.

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shall have his costs in priority ; but they are the persons to determine whether such a course of proceeding will be for their benefit, and not the debtor ; and without an express agreement, the debtor cannot get his costs against them.

RICHARDS, B.

The plaintiff does not file this bill as a person entitled to any portion of the charge upon this estate. His only title is to the surplus after paying off the charge. As to the cases in *Molloy*, some of them are very good ; but others of them are short notes, which are very nearly unintelligible.

The COURT refused the plaintiff's application, and said nothing about his costs in the decree.

O'CONNOR v. BERNARD.

May 12.

Where the purchaser has been discharged upon a report of bad title, it is the right of the inheritor to have the estate again set up to be sold ; and, therefore, the Court will not, against his desire, substitute in the place of the discharged purchaser, a person who offers to take the estate at the same price, and not object to the title.

MR. S. COLLINS, Q. C., for the plaintiff, moved that it be referred to the Remembrancer to settle conditions of sale. The former purchaser had been discharged upon a report of bad title ; certain of the title-deeds not being forthcoming.

Mr. Hunt, for the defendant, consented to the application.

Mr. Collins then offered to undertake to procure two new purchasers in the place of the discharged purchaser, who would take the estate at the price for which it had formerly been sold, and would not object to the title.

Mr. Hunt objected.

PENNEFATHER, B.

It is quite out of course. When the purchaser has been discharged, it is the right of the defendant to have the estate again set up to be sold.

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Equity Exch.

MULEY and others. . . . *Petitioners ;*
SMITHS *Respondents.*
1 *W.* 4, c. 60.

May 13.

MR. J. ORPEN moved the prayer of this petition, which was, that it be referred to the Remembrancer to inquire and report whether the respondents or any or either of them were possessed of the several trust funds in the petition mentioned as a trustee or trustees within meaning of the Act of the 1 *W.* 4, c. 60 : and if so, that the Remembrancer do approve of fit and proper persons to be trustees in their place ; &c.

The petition stated that by Indenture of the 10th of June 1820 (in which was recited a lease of the 20th of October 1817 of certain premises for the term of 900 years, and which was then vested in J. Bomford ; and also that J. Bomford had by his bond of equal date with this indenture secured to P. Smith the principal sum of £500 with interest), it was witnessed that for the purpose of making a provision for the petitioners Rosina Muley and Sophia Murphy otherwise Wilson, and for the children of Sophia, J. Bomford assigned to P. Smith, his executors, administrators and assigns, the premises demised by the lease of 1817 : and it was declared that he should (after payment of the head rent and other outgoings) pay the yearly profit rent of the said premises and also the interest on the bond for £500 to the petitioners Rosina and Sophia in equal shares during their joint lives ; and after the death of Rosina in the lifetime of Sophia, then the entire of said rents and interest to Sophia during her life ; and after her decease, then (subject to the life interest of Rosina in one moiety of same), that P. Smith should stand possessed of said trust funds in trust for the children of Sophia.

The petition then set forth the marriage settlement of Sophia Wilson with A. Murphy, and other deeds ; whereby a sum of £500 secured by mortgage, was vested in P. Smith in trust for S. Murphy and her children : that J. Bomford died in July 1837, and that his executors in August 1837 paid to P. Smith the sum of £500 which had been secured by the bond of J. Bomford : and which sum was invested by P. Smith in the purchase of three per cent consols :—that A. Murphy died leaving his wife Sophia and three children him surviving,—that Sophia Murphy had requested P. Smith to advance her £100, part of the trust funds, upon the security of her bond and warrant of attorney and an insurance upon her life, which he had accordingly done :—and that P. Smith had died in November 1840, having appointed the respondents his executors, who proved his will ; but that they had never acted and had positively refused to act in the trusts aforesaid ; and in particular on the 9th of January 1841, they refused to receive the dividends on the stock then standing in

A trustee of chattels real and of stock having acted in the trusts died, and appointed executors resident within the jurisdiction who proved his will, but never acted and refused to act in the trusts, which were still continuing.—

Held, that the Court had jurisdiction to appoint new trustees under the 1 *W.* 4 c. 60, s. 22.

The original trustee having committed a breach of trust, the Court appointed new trustees, the executors of the old trustee undertaking to replace the trust fund.

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 SMITHS.

the name of P. Smith, although applied to by the petitioners so to do: and that they were willing, if the Court should so direct, to replace the £100 of the trust funds which had been advanced by P. Smith to Sophia Murphy.

Mr. *Orpen*.—The trust property consists of lands held for a term of years, and stock in the public funds. The settlement does not contain any power to appoint new trustees; but the 22nd section of the 1 W. 4, c. 60, authorizes the Court to appoint new trustees in cases which fall within the operation of the previous sections of the act. The previous sections applicable to this case are the 9th and 10th. They both include within their operation the case of a trustee or his executor neglecting or refusing to assign or transfer the trust funds or to receive the dividends.—[*RICHARDS, B.*—You do not bring your case within those sections. No request in writing has been made, or deed tendered by the person entitled to the executors, in the manner required by the act].—It is not necessary that it should. *Johnston v. Anketell* (a); *O'Keeffe v. Thompson* (b).

PENNEFATHER, B.

In the case of a recent trust, the 22nd section of the act places a deed which does not contain a power to appoint new trustees, in the same situation as a deed containing such a power, in the instances mentioned in the former sections. The act is very obscure; but it appears to me that this is a case within its operation.

FOSTER, B.

The Legislature evidently intended that the act should have an extensive application; but we cannot disguise it from ourselves that if we were to construe it strictly, it would have little or no operation at all. We are bound to give it effect wherever we can.

RICHARDS, B.

I do not deny but that I have some difficulty in saying that this is a case within the act: but this Court and the Court of Chancery have construed those sections in the way in which we are now called on to construe them. This Act of Parliament must receive its construction from the decisions of the Courts; for it is exceedingly obscure: and therefore, upon the authorities I accede to the application. At the same time, I think that the construction given to the act is a wholesome and beneficial one.

Reference made accordingly; the respondents undertaking to replace the £100 lent by their testator to Mrs. Murphy.

(a) 5 Law Rec. N. S. 201.

(b) 6 Law Rec. N. S. 233.

1841.
Equity Exch.

MACKAY v. ORR.

May 16.

MR. NELSON, on behalf of the administratrix of a discharged purchaser, moved that it be referred to the Remembrancer to ascertain the sum due to her as such administratrix, for interest and costs; and that the same when ascertained be paid to her by the plaintiff.

The lands were set up to be sold in November 1831, on which occasion the deceased was declared the purchaser, and lodged one-fourth of his purchase money in bank to the credit of the cause. Some time in the year 1832, an attachment issued against him for not completing his purchase; the costs of which had not as yet been paid. It did not appear that any further proceedings were taken until the 20th of June 1834, when the purchaser obtained an order for a reference to the Remembrancer to ascertain whether a good title could be made to the premises. On the 10th of December 1834 the Remembrancer reported that a good title had not been made to them; and thereupon the purchaser was discharged, and it was ordered that the one-fourth of the purchase money, lodged by him in Court, should be repaid him, without prejudice to his applying for his interest thereon and costs, when there should be a fund in Court. On the 24th of January 1839, the premises were set up to be re-sold; on which occasion the plaintiff, by the intervention of a trustee, became the purchaser thereof; and shortly afterwards obtained an order that the Remembrancer do execute the conveyance to him, upon his signing a receipt in the cant book for the amount of the purchase money, he being the only creditor, and the sum reported due to him exceeding the amount of the purchase money.

A purchaser under the decree of the Court was discharged upon a report of bad title; and it was ordered that his deposit be paid back to him, without prejudice to his applying for the interest thereon and his costs when there should be a fund in Court. He died before either the costs were taxed or a fund for their payment was realised.—

Held that on a fund being afterwards realised, his personal representative was entitled to be paid thereout the interest and costs.

An order had been made awarding an attachment against the purchaser for not completing his purchase.

Thereupon he obtained an order of reference as to the title.—Held that he was not entitled to interest for the period intervening between the date of the lodgment of the deposit and the date of the order of reference, or to

Mr. *M'Mechan* for the plaintiff.—There are three objections to this application. First, it is for the payment of costs alleged to have become due to a party who died before either they were taxed or the fund for their payment was realised. *Barry v. Stawell* (a) does not go the length of this case. There the costs were decreed; here there was neither order or decree for their payment. The words "without prejudice, &c." in the order determine nothing. *Barry v. Stawell* is also of dubious authority; it is contrary to *Averall v. Wade* (b), and has gone much farther than the other cases on the subject. Secondly; supposing this to be the application of the purchaser himself, it ought not to be granted because of his *laches*. Four years elapsed between the sale and the

the costs incurred by him during that interval; and that the costs of the attachment should be set off against the interest and costs due to him.

(a) 3 Ir. Eq. Rep. 146.

(b) 1 Moll. 571.

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Equity Exch.
MACKAY
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ORE.

report of bad title. If a purchaser have an objection to the title, he ought to bring it forward at once, or he will not be allowed interest and costs. *Magennis v. Fallon* (a). Thirdly, The costs of the attachment remaining unpaid, it must be taken that there was an agreement to set them off against the purchaser's interest and costs.—[RICHARDS, B. You are entitled to credit for them.]

RICHARDS, B.*

I am of opinion that the purchaser is not entitled to interest for the time which elapsed before he obtained the order of reference as to the title. The case is a plain one. It appears that the purchaser, instead of proceeding to complete his purchase as he ought, so acted that the plaintiff was obliged to obtain a conditional and then an absolute order for an attachment against him. He then became active, and obtained the order of the 20th of June 1834, under which the report of bad title was made on the 10th of December 1834. According to the course of this Court, the purchaser thereupon became entitled to get back his deposit, and to be paid the interest thereon, and also the costs properly and necessarily incurred by him in the investigation of the title. In this case, when the deposit was paid back to the purchaser, it happened that there was not a fund in Court for payment of his interest and costs; but subsequently the estate was sold; and though there is not now any fund actually in Court, yet the case is the same as if there were; for the plaintiff has become the purchaser, and has retained the purchase money in part satisfaction of his debt. There is therefore no difficulty in making an order on the plaintiff to pay the interest and costs to which the purchaser is entitled: and it appears to me that those costs are the costs of the order of the 20th of June 1834, and of the subsequent proceedings; and that the only interest he is entitled to is interest from the same 20th of June until the deposit was repaid to him: and as against such costs and interest, the costs of the attachment must be set off.

It has been argued that the right to the interest and costs, in this instance, has died with the party entitled to receive them. Now I do not consider it advisable to discourage purchasers from bidding for estates set up to be sold under the decree of the Court. When a person bids for such an estate on the supposition that he is to get a good title with it, he ought, if a good title cannot be made out, not merely be paid back his deposit, but also be paid interest thereon, and be indemnified against all his expenses. That is but natural justice; and therefore I am not disposed to press the case further against the purchaser than I am coerced by the rules of law, and by express authority. The purchaser's right to the interest and costs is clear; and the order paying him back his deposit,

(a) 2 Moll. 561, 574.

* *Solus.*

and saving his right to apply for them when there should be a fund in Court, is a full recognition upon record of that right. Therefore I think that this is not that species of right which dies with the person. I do not consider that sales under the Court fall by any means within the principle relied upon. Then it is said that though interest does not fall within that principle, costs do. But without entering into the question discussed by the Master of the Rolls in *Barry v. Stawell*, I must say that wherever there is a right subsisting which survives, the costs necessarily appertaining to it are accessorial and must also survive. Here the title of the personal representative to the interest is clear: and that carries with it the title to the costs.

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Mr. ROGERS, with whom was Mr. *Corbett*, for the plaintiff, applied for liberty to substitute the service of the subpœna to appear and answer upon the law agent and on the receiver of the defendant. The affidavit upon which the application was founded stated that the suit was instituted to raise the amount of a charge affecting lands in Ireland; and that the defendant was resident in France, out of the jurisdiction of the Court, and had so resided for the last twelve months, but that the plaintiff was ignorant of his precise place of residence there. That Mr. Guinness had been appointed receiver of the rents of the lands affected by the charge, in a cause then pending in the Court of Chancery; and that Messrs. Symes and Keller were the law agents of the defendant; and that in an advertisement for the sale of the defendant's property, which had lately appeared in one of the Dublin newspapers, Messrs. Symes and Keller were referred to as the persons to whom proposals were to be made. *Callaghan v. Pepper (a)*, and *Somers v. Conolly (b)* are in point.—[RICHARDS, B. Guinness has been appointed receiver by the Court of Chancery in a cause in which the defendant is a party. That is a very different thing from his being appointed by the party himself to receive the rents for his benefit. The appointment of a receiver in a cause is generally a proceeding hostile to the owner of the estate.]—That objection does not apply to Messrs. Symes and Keller.—[RICHARDS, B. The act does not authorise the Court to order the subpœna to be served upon the law agent of the defendant.—BRADY, C. B. The language of the act is very precise. It empowers the Court to order the subpœna to be served

May 28.
A receiver appointed by the Court of Chancery in an adverse suit is not the receiver of the inheritor within the meaning of the 4 & 5 W. 4, c. 82. The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute service of the subpœna to appear on the law agent of the defendant.

(a) 2 Jo. 46.

(b) 1 Ir. Eq. Rep. 416.

1841.
Equity Exch.
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upon the receiver, stéward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned.—RICHARDS, B. It must be shewn, that with reference to the land upon which the plaintiff's demand is charged, there is some person acting as the receiver for the defendant, or remitting him the rents thereof: otherwise the land agent might be for other lands altogether.—BRADY, C. B. And if the receiver over those very lands be appointed in a suit in Chancery, how can he remit the rents to the defendant?]

No rule.

EDWARDS v. PLUNKETT.

May 29.

If the defendant have not appeared in the cause it is not necessary to give him notice of a motion for liberty to execute a sequestration on the decree against his real estate: but the motion will not be granted if the annual value of the real estate be not stated in the affidavit.

MOTION for liberty to execute a sequestration which had issued to compel payment of the sum decreed to be paid in this cause. The suit was instituted for the recovery of certain arrears of tithe composition; the defendant had not appeared in the cause. No notice was given of this application; which was grounded upon a return of *non est* to an attachment. Counsel stated that he applied for liberty to execute the sequestration against the real estate as well as the personal property of the defendant.

The COURT* were of opinion that the want of notice was not an objection to the application, as the defendant had not appeared in the cause; but said that they would not grant the application so far as it sought for liberty to execute the sequestration against the real estate of the defendant, for that the annual value of it was not stated in the affidavit.

The application so far as it related to the personal property was granted.

* Pennefather, B., and Richards, B.

1841.
Equity Ech.

BROWN v. ALLEN.

June 5.

MR. ROGER C. WALKER, on behalf of the personal representative of the plaintiff moved for liberty to file a supplemental bill.—The sole plaintiff had died pending the suit, and had appointed the applicant his executor. By his will, he devised and bequeathed his property, including the subject-matter of the suit, to certain persons. The present application was for liberty to file a supplemental bill against the devisees and legatees of the late plaintiff.

Where the cause abates by the death of a sole plaintiff, and it becomes necessary to file a bill of revivor and supplement, it may be done without the order of the Court first obtained.

PENNEFATHER, B.—It is unnecessary to make any order upon this motion; for the applicant must file a bill of revivor, and may add to it the supplemental matter without the order of the Court.

But, *per Pennefather, B.*, where the cause abates by the death of one of several defendants, and it becomes necessary to file a bill of revivor and supplement, the leave of the Court must be first obtained.

RICHARDS, B.—This application certainly is not in accordance with the practice of the Court of Chancery; for there, wherever before decree it becomes necessary to file a bill of revivor, the party may make it a bill of revivor and supplement without the order of the Court.

Mr. *Walker*.—It has been ruled by this Court that it is necessary to obtain leave to file a bill of revivor and supplement, where the suit abated by the death of one defendant, and the infant daughter of another defendant had come into *esse*, whom it was necessary to make a party; *Conyers v. Crosbie (a)*.

PENNEFATHER, B.

The distinction is this: where the cause is wholly abated by the death of the plaintiff, the party seeking to revive the suit may file any kind of bill he pleases, without the order of the Court; nor is there any one on whom to make the order, the cause having ceased to exist. But where there is a partial abatement, as by the death of one of many defendants, an order is necessary; for if the plaintiff might file a supplemental bill without such an order, he would be at liberty to introduce new matter into it, affecting the defendants who still remained before the Court, and as to whom the cause had not abated, without giving them an opportunity of objecting to a new case being made against them.

No rule.

1841.
Equity Ech.

June 18.

ANONYMOUS.

Where a receiver has been appointed under the 5 & 6 W. 4, c. 55, and not extended to any other matter, the Court will not, at the instance of the petitioner, make an order on him merely to pay the petitioner the costs of his appointment, unless the latter take the order at his own expense.

THIS was a petition matter, in which a receiver had been appointed under the 5 & 6 W. 4, c. 55, for payment of a judgment debt. The receiver had not been extended to the matter of any other petition.

It was now moved on behalf of the petitioner, that the receiver do pay to him the costs incurred by him in appointing the receiver; and that he do have credit for the same on passing his account, but—

RICHARDS, B.,* said that he would not grant the order unless the petitioner took it at his own expense: which the petitioner declining to do, the Court referred it to the Remembrancer to take an account generally of what was due to the petitioner on foot of his judgment.

* *Solus.*

LYNCH v. SKERRITT.

June 23, 24.

Creditors who prove under a decree obtained in a suit instituted by a legatee for the administration of the assets of the deceased, are not bound to contribute to the difference between the plaintiff's costs between attorney and client and party and party.

MR. BENNETT, Q.C., for the plaintiff, moved that the several creditors who came in under the decree to account in this cause, should contribute to the difference between the plaintiff's costs as between attorney and client and party and party, in proportion to the sums allocated to them; and that they should also assign to a trustee the several securities held by them for their demands, the estate being only collaterally bound for the payment thereof.

The bill was filed by a legatee of Mary Skerritt for the general administration of her estate, and the payment of the legacies given by her will. She had devised her property to trustees, in the first instance, to pay her debts. Several judgment creditors came in and proved under the decree in the cause; and the Remembrancer reported that they had obtained judgments against other persons to secure the same sums; and that if the funds in this cause were applied in payment of their demands, the parties in the cause were entitled to proceed upon the judgments obtained against the principal debtors.

Mr. *Bennett* and Mr. *Burroughs*, for the plaintiff.—The order we ask is consonant with justice and the practice of the Court.—[PENNEFATHER, B. The rule as to contribution has never been extended so far as to make creditors contribute to the costs of a suit instituted by a legatee. The judgment creditors are to be paid out of the estate; the legatee is only entitled to be paid out of the surplus after satisfying the demands of the judgment creditors. That distinction was taken by this Court not very long since.]—The exceptions are that specific encumbrancers, parties and legatees will not be compelled to contribute to the suit of a judgment creditor. No distinction can be drawn between this suit and the suit of a creditor. The assets are administered in each in the same manner. In *Bracken v. Drought* (a), the bill was filed by a legatee; and the Court held that the creditors should contribute.—

[PENNEFATHER, B. The plaintiff in that case was a creditor as well as a legatee; and he filed the bill in both capacities. He was not to be deprived of the benefit derivable from his character of creditor because he also happened to be a legatee. The principle upon which the cases have been determined is against the application. The creditor is not entitled to any portion of the surplus; his claim is upon the fund itself; but the claim of the legatee is to a portion of the surplus. Suppose the inheritor were to file a bill to carry the trusts of the will into execution, he could not call on the creditors to contribute to its expense; for he is only entitled to the surplus after paying their demands in full: and a legatee is in the same situation. With regard to other legatees, the question would be different; they take advantage of the plaintiff's suit, and stand in the same right with him; and, therefore, I do not say that contribution cannot be had as against them: but I am clear that a legatee plaintiff cannot have contribution against creditors.]—The testatrix here devised her property to pay her debts; therefore, the creditors are *cestui que trusts*, and should contribute to the expense of the suit, which is for the common benefit of them and the legatees.

PENNEFATHER, B.

I remain of the opinion I have already expressed. I do not think that the circumstance of the testatrix having devised her property in trust for payment of her debts makes any difference: but because it is said that there has not been any decision in such a case as the present, I will refuse this part of the application without costs. As to the other part of the application, I will make an order that the sums reported be paid to the several creditors, and that the creditors do assign their judgments to a trustee for the parties in the cause, they consenting so to do.

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Mr. T. B. C. Smith, Q. C., *amicus curiæ*, said that in *Pidgen v. D'Alton*, Michaelmas Term 1839, this Court held that a legatee plaintiff was not entitled to have the creditors contribute to the expense of his suit.

O'KELLY v. BODKIN.

June 26, 28.

A creditor who, after final decree in a creditor's suit, applies for leave to file a charge under the decree to account, should state by affidavit either that he had no notice of the pendency of the suit, or if he had, should account for his not having filed his charge at the proper time under the decree.

After final decree in a creditor's suit, the Court will not give permission to a person having a judgment affecting part of the estate decreed to be sold, to file a charge on foot of it under the decree to account, unless it appear that it is necessary for the object of the suit that an account should be taken on foot of that judgment, or that the suit is so constituted that the same relief may be given in it as in an original suit instituted by the party applying. Therefore, where after final decree, a person applied for leave to prove a judgment affecting part of the lands decreed to be sold, under that portion of the interlocutory decree which directed an account to be taken of all charges and encumbrances affecting the real and freehold estates of the deceased, and it did not appear that it was necessary for the purposes of the suit that those lands should be sold, and the personal representative of the consor of the judgment was not a party to the suit, the Court refused the application.

THE SOLICITOR-GENERAL, on behalf of the personal representative of Mary Anne Lynch, a creditor having a judgment affecting the lands decreed to be sold, moved that he be at liberty to go before the Remembrancer and file a charge under the decree to account in this cause; and to obtain a separate report thereon at his own expense.

The final decree was pronounced upon the 11th of February 1841. Some of the lands mentioned in it had been sold; and the money arising therefrom was in bank to the credit of the cause.

The *Solicitor-General* was proceeding to state the case, when PENNEFATHER, B., inquired whether the affidavit upon which the motion was founded stated that the applicant had no notice of the pendency of the suit.

The *Solicitor-General*.—No. The statement is, that neither he nor any person on his behalf, had any knowledge of any decree for an account of the encumbrances upon the estate until after the making of the decree to account, and shortly before the pronouncing of the final decree.

PENNEFATHER, B.—That is not sufficient. He is bound to state either that he was ignorant of the pendency of the suit; or if he were not, to account for his not having come in and filed his charge at the proper time under the decree. Such a statement is not a matter of form; it may be very material in ascertaining the amount due to the applicant. I think I am bound to have it ascertained whether the applicant had notice of the pendency of the suit or not; I will not, however, refuse his application absolutely, but will let the motion stand in order that he may make such an affidavit.

Mr. *Monahan*, Q. C., for the inheritor.—There are other objections to this application ; and the inheritor intends to submit to the Court that it ought to be refused with costs.

PENNEFATHER, B.—Then I must hear the motion.

The facts, as they appeared from the affidavit of the applicant and the proceedings in the cause, were these :—The judgment was obtained by Mary Anne Lynch against Hyacinth Bodkin previous to the year 1806. Its precise date was not stated. Hyacinth Bodkin was seized in fee of certain lands, which, in February 1806, he sold and conveyed to Dominick George Bodkin and John Bodkin, and their heirs, as tenants in common. The conveyance recited the existence of several encumbrances affecting the sold lands, and amongst them this judgment ; and that a sum of £4900, part of the purchase-money, was retained by the purchaser to satisfy those encumbrances ; and the purchasers thereby covenanted with the vendor to pay those encumbrances and to indemnify him therefrom. The affidavit then stated, that one moiety of the interest was paid by Dominick George Bodkin down to 1823 ; since which period no money had been paid on account of that moiety of the interest, except a sum of £10 in 1828 ; and that two sums had been paid on account of the interest on the other moiety ; one in 1822 by John Bodkin, and the other in 1827 by his steward and agent.

The bill was filed on the 27th of October 1832, to foreclose a mortgage dated the 1st of May 1822, and made by John Bodkin to Anthony Clarke. This mortgage, which did not include any of the lands derived from Hyacinth Bodkin, together with the judgment collateral therewith, afterwards became vested in the plaintiff. John Bodkin died on the 21st of May 1831 ; and the bill prayed that an account might be taken of the real, freehold and personal estate and effects whereof he died seized and possessed ; and of his debts, legacies and funeral expenses ; and also of all encumbrances affecting the lands and premises whereof he died seized or possessed. The decree to account, which was pronounced the 23rd of June 1835, directed an account to be taken of what was due to the plaintiff on foot of the mortgage and judgments in the pleadings mentioned, and of all charges and encumbrances affecting the mortgaged premises prior to the mortgage ; and also an account of the real and freehold estates of John Bodkin, and of his personal estate, and of his debts, legacies and funeral expenses ; and also of all charges and encumbrances affecting the said real and freehold estates, and the natures, priority, and amount thereof, &c. The Remembrancer in pursuance of this decree, reported that J. Bodkin was, at the time of his death, seized in fee of the equity of redemption of the mortgaged premises, and also was seized in fee of the lands derived by

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him from Hyacinth Bodkin : but he did not report that there were any charges or encumbrances exclusively affecting the lands derived from Hyacinth Bodkin. By the final decree, all the lands mentioned in the report were directed to be sold : and accordingly, two of the denominations of land included in the mortgage were sold for a sum of money not sufficient to pay the reported debts ; but it was alleged at the Bar by the inheritor, that the remaining denomination of land included in the mortgage would produce, upon the sale thereof, a sum of money much more than sufficient to discharge the unpaid reported debts ; and that it would not be necessary for the purposes of the decree to sell the lands derived from Hyacinth Bodkin.

Mr. *Monahan*, for the inheritor, argued that as it not was necessary for the purpose of paying the sums decreed, that the lands derived from H. Bodkin should be sold, therefore the Court would not in the exercise of its discretion, grant the application.

The *Solicitor-General*.—Under the decree to account, the applicant was entitled, as of right, to file a charge and have the sum due to him included in the report : and so long as the fund remains undistributed, the Court will permit him to file a charge and obtain a report at his own expense, in order to avoid the necessity of another suit ; although he cannot be paid until the lands upon which his judgment is a lien, are sold. Here the final decree directs those lands to be sold.—[PENNEFATHER, B. The principle is, that while there is a fund in Court, on which the applicant's demand attaches, the Court will not order its distribution ; but will give him an opportunity to prove his demand, in order that his fund be not taken from him. The applicant must shew that his demand attaches upon the fund in Court. That is not the case here. If the demands of the parties in the cause be satisfied by the sale of one of two estates, I do not apprehend that a creditor upon the other estate has then a right to come in and insist upon the second estate being sold for payment of his demand. I do not know any case which has gone that length.]—There is no case in terms the same as the present ; but in principle, there is no difference between this and the reported cases. If the purposes of the decree be satisfied by the sale of one estate, the applicant has no right to carry this application ; but that is the very question to be decided. Here they have not been satisfied ; for the decree to account directs an account to be taken of all encumbrances affecting those lands ; under which direction the applicant was clearly entitled to prove his demand ; and if he had done so in the regular progress of the suit, the Court would have directed those lands to be sold for the payment of it.

PENNEFATHER, B.—But he has not done so. The answer to this ap-

plication is, that the fund in Court is not liable to the demand of the applicant; and *non constat* that there ever will be such a fund in Court. Until there be, the creditor has no ground upon which to sustain his application. If he had come in regularly under the decree, he would have had a right to proceed under it, and to have the lands which are subject to his judgment, sold for payment of his demand. That however is a very different proposition from saying that the Court will assist a person, who has not proved his demand in the regular progress of the suit, to intervene for the purpose of having further sales, not necessary, or which do not appear to be necessary, for the purposes of those who are before the Court as parties litigant. There is no precedent for such an application. It will be time enough to make the order when the lands which are liable to this demand are sold. No injury is done to the applicant by refusing the motion; for his fund is not taken from him, and he may file his bill to enforce payment of his judgment. The application, however, is one which ought not to be refused with costs; and, therefore, I shall say, No rule on the motion. I would also add, that in my opinion the affidavit upon which it is founded is insufficient, for the reasons I have mentioned.

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No rule.

Upon a subsequent day (Monday the 28th of June),—

Mr. *Blake*, Q. C., on behalf of another judgment creditor, whose judgment affected Dominick George Bodkin's moiety of the lands derived from Hyacinth Bodkin, and which moiety had become vested in John Bodkin, made a similar application. In addition to the facts relied on upon the former motion, it appeared that the applicant had been made a party to the cause in 1834; and that when the decree to account was pronounced, he was aware of the facts connected with this judgment; but he said that he was not aware of his rights under those facts.

Mr. *Monahan*, Q. C., for the inheritor, opposed the application.

PENNEFATHER, B.

I am of opinion that this application must be refused. It is of a very novel nature. The bill is filed by a mortgagee of the late John Bodkin, to whom three distinct denominations of land had been granted in mortgage and who had also obtained against J. Bodkin a judgment collateral with the mortgage, to raise the amount of the sum due on foot of the mortgage and judgment; and by the decree it is directed that an account

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be taken of the sum due on foot of the mortgage, and (by reason of its being the personal debt of J. Bodkin, and of his death), an account of his real, freehold and personal estate, and of his debts, legacies and funeral expenses. If the decree had stopped there, it is evident that the present applicant could not prove his demand under it; for he was not a creditor of John Bodkin. So far as the debts of John Bodkin are concerned—and it is about those debts that the suit is conversant—the applicant has no ground to come into Court. But in order to assist the creditors of John Bodkin, and to enable them to clear his estates of prior encumbrances and to sell them (he having become seized of some estates, of which he died possessed, which had formerly belonged to Dominick George Bodkin, and upon which the judgments obtained against Dominick George Bodkin would have attached), an account is directed to be taken of all encumbrances affecting those estates. It is under that part of the decree that the present applicant seeks to come in and prove his demand: and if it were necessary for the object of the parties in the cause—that is, either the creditors or the representatives of John Bodkin—that those estates should be cleared of encumbrances, I think that the applicant might be permitted to come in and prove his demand. But in this instance he has pretermitted the proper time of filing his charge under the decree: and the question now is, whether this judgment creditor, who was not, as such, originally an object or within the contemplation of the suit, but who only had liberty to come in and prove his demand in order to clear the estate for the benefit of those who were the proper objects of it; and who had himself in another right been made a party to the cause;—whether he, having pretermitted his time, shall be permitted to come in and prove his demand, as affecting estates which had belonged to Dominick George Bodkin, and had on his death vested in John Bodkin. In my opinion, the application being resisted by John Dominick Bodkin, the inheritor, and not supported by the plaintiff or the creditors, cannot be granted. The Court ought not to accede to applications of this nature, unless they are satisfied that it is necessary for the objects of the suit, or that full and effectual justice can thereby be done, as completely as it might be attained in an original proceeding. Now, the proper fund for the payment of this judgment is the personal estate of Dominick George Bodkin; and of that personal estate no account has been directed to be taken in this cause. It may be said that it is not probable that there is any such estate; but of that I can have no knowledge. It is sufficient for me to see that there is not any representative of the primary fund before the Court, and that the parties to this cause do not desire or think it necessary that an account should be taken on foot of this demand. I therefore am of opinion that the applicant is not entitled to the assistance of the Court upon this motion; the more espe-

ally as he is a party in the cause ; and, therefore, I refuse, his motion, with costs.

After this judgment had been pronounced, Counsel appeared in Court for the plaintiff, and stated that he also opposed the application.

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LOUGHREY v. LAHIFFE.

It was moved that a consent be made a rule of Court. The consent was, that a sum of £500, to which four persons were entitled in equal shares, should be paid out to them respectively. One of the persons entitled was a married woman ; and the consent was, that her share should be paid to her and her husband.

June 26.
One-fourth of £500 to which a *feme covert* was entitled, was paid to her husband, without the *feme* being examined to waive her equity.

RICHARDS, B., made the consent a rule of Court, without requiring the *feme covert* to be privately examined whether she would waive her equity.

POWER v. POWER.

Mr. JENKINS, on behalf of ———, moved to open the biddings for the premises called Lot No. 1, set up to be sold under the decree in this cause, upon an advance of £250.

The premises set up to be sold under the decree consisted of three lots. Lots Nos. 2 & 3 were first set up, and a sum of £255 was bid for them by Mr. Brady. Lot No. 1 was then set up, the purchaser of the other lots not being at the time declared, and a sum of £6500 was bid for them by Mr. Brady. There being no higher bidders, Mr. Brady was declared the purchaser of all the lots. The several lots were not contiguous ; they were situate in different counties : but the reason they were set up in the manner above mentioned was, that the title, which was common to them all, was very complicated ; and it was deposed that the expense of making out the title to Lots Nos. 2 and 3 would exceed the amount of the purchase-money of those lots. The sale had not been confirmed absolutely.

June 26.
In opening biddings, this Court does not tie itself down to any precise rule as to the amount of the sum to be advanced ; but looks substantially, to that which is for the benefit of the parties, and to the circumstances of the particular case before it.

Mr. S. Collins, Q. C., for Mr. Brady the purchaser, objected that the

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biddings for all the lots ought to be opened; and also, that the over-bidding was not sufficient in amount; and he cited *Graham v. Gledstones* (a).

The *Solicitor-General* for the inheritor, and Mr. *Bennett*, Q. C., for the plaintiff and the creditors, objected to the application on the same ground as the purchaser, and also on the ground that the fund would be put to great expense in making out the same title to the different purchasers.

Mr. *Jenkins*, in reply, cited *Gorman v. Browne* (b).

RICHARDS, B.

This application is somewhat peculiar in its circumstances. The purchase-money bid for this lot is £6500; and the sum which the party seeking to open the sale proposes to advance is only £250. This Court does not tie itself down to any precise rule as to the amount of the sum to be advanced; it never has done so, and even the Court of Chancery, in which formerly a stricter rule prevailed, has now, I believe, abandoned the practice of requiring an advance of £10 per cent. on the bidding sought to be opened.* This Court always looks substantially to that which is for the benefit of the parties in the cause, and to the circumstances of the particular case before it; for it is not upon every light occasion that we will set aside a purchase at the instance of a party who chooses to bid a small sum in addition. Such a practice would be well calculated to damp the biddings, and to injure sales under the decrees of the Court; and would, in fact, render the Officer's declaration of the highest bidder a mere matter of form. But what the Court looks to is, to ascertain what is due to the party bidding, and what is due to the creditors; and we will not refuse a substantial sum, if accepting it be for the benefit of the creditors. In this case, the lands were in substance sold in one lot, because it appeared that the title to each lot was the same; and as this motion is opposed by all parties—plaintiff, defendant, creditors and purchaser—I have no hesitation in saying that justice would not be done to them if the sale were opened upon the terms offered. It is a further objection to the application, arising from the circumstances of the case, that the applicant does not seek to open the biddings as to the other lots. Nevertheless, if he will now offer a substantial sum as an advance, I will open the biddings of Lot No. 1.

Mr. *Jenkins* then offered an advance of £500, and the Court ordered the biddings of Lot No. 1 to be opened. The sale of Lots Nos. 2 and 3 was confirmed.

(a) 1 Jo. 436.

(b) S. & Sc. 154.

* Vide *Digby v. Browne*, 1 Ir. Eq. Rep. 377.

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JACKSON v. LORD GRANARD.

MR. LEAHY, on behalf of H. C. Bowen, applied to open the biddings upon the sale in this case, on an advance of £150. Mr. O'Brien had been declared the purchaser at the sum of £2800. The sale had not been confirmed absolutely.

The *Solicitor-General*, for Mr. O'Brien, opposed the application.

The facts were, that upon a former occasion Mr. Bowen had been declared the purchaser at the sum of £2550. Mr. O'Brien opened the biddings upon an advance of £150. Upon the resale Mr. Bowen attended, and bid £2750; and Mr. O'Brien having bid £2800 was declared the purchaser.

PENNEFATHER, B.

I am of opinion that the biddings ought not to be opened. Some regard must be had for purchasers, otherwise lands never will be sold to advantage under the decree of the Court: and although the parties may lose something in this particular case, the sale of estates generally will be benefitted by pronouncing no rule on this motion.

June 28.
The biddings having been opened upon an advance of £150 on £2550, the lands on the resale produced £2800. The Court refused the application of the first purchaser to open the second biddings upon an advance of £150, it appearing that he had been present at, and had bid at the second sale.

JAMESON v. FARRER.

THE SOLICITOR-GENERAL, on behalf of the receiver, moved to make absolute a conditional order for an attachment against a tenant named Watkins for non-payment of his rent.

In 1836 the premises in question, which consisted of a dwelling-house and demesne lands, were set up to be let for seven years pending the cause, from the 1st of July in that year; and Watkins was declared the tenant of them, at the yearly rent of £200, payable the 1st of January and the 1st of July. He entered into possession; but did not either execute a lease or give security by recognizance. The lands were afterwards sold under the decree of the Court; and on the 22nd of

continued in occupation subsequent to the last gale day: and it will be referred to the Remembrancer to ascertain what is the amount of such rent, having regard to the season of the year when the broken gale occurred, and the nature of the demised premises.

June 28.
A tenant under a letting made by the Court for seven years pending the cause, who has been put out of possession by the injunction of the purchaser in the interval between two gale days, is bound to pay a rent for the period he con-

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May 1841 the purchaser executed his injunction, and turned Watkins out of possession. The question at issue was, whether Watkins was bound to pay a proportionable rent for his occupation from the 1st of January to the 22nd of May 1841, when the injunction was executed.

The liability of the tenant is the same as if a lease had been executed to him for seven years pending the cause; for the letting was for that term: and the meaning of such a letting is, that the tenant shall have the lands for the term specified, paying for them at the rate of £200 per annum for the period he enjoys them.

Mr. Ball, for Watkins.—The contract is to pay half-yearly, on every 1st of January and 1st of July; there is no contract to pay a proportionable part of a gale. The case is not within the statutes apportioning rent. The parties themselves have determined the tenancy by bringing the suit to a close: the broken gale is the consequence of their own act. In *Creed v. Creed* (a), a tenant was put out of possession by the injunction of the Court, and he applied for a reference to ascertain the value of the crops in the ground, claiming to be entitled to them as emblements. The Master of the Rolls granted his application, but did not charge him with any rent for the broken half year.

Mr. Serjeant Green, *amicus curiæ*.—The question of apportionment was not raised in that case.

PENNEFATHER, B.

It is a great mistake to say that there is no contract in this case to pay an apportioned rent for the broken gale; or that the tenancy has been determined by the act of the lessor. There is a contract to hold for seven years, provided the cause lasts so long (that is the meaning of the expression 'pending the cause,' and it intimates that the tenancy may expire before the end of the seven years), the tenancy is one of an uncertain duration, and the tenant agrees to make a recompense commensurate with his tenancy. That is his contract. Again, the tenancy is not determined by the act of the lessor. The parties to the suit have a right to bring it to a termination as soon as they can. They are not the persons who let the lands: that is the act of the Court; and their rights are undisturbed by the letting, for the Court never makes a contract which is not subject to the rights of the parties. There is, therefore, nothing in the objection that the contract has been put an end to by the act of the parties who made it; it has been put an end to by a person who, according to the contract, has that right; and the tenant took the premises subject to the exercise of

(a) 3 Ir. Eq. Rep. 207.

that right. With respect to the case of *Creed v. Creed*, I fully accede to the decision of the Master of the Rolls, that in that case the tenant was entitled to the emblements. Such a right follows from the principles I have laid down; for where the tenure is for an uncertain duration, the tenant is entitled to the emblements. Thus, by the common law, a tenant *pur autre vie* is, upon the death of the *cestui que vie*, entitled to the whole emblements, without making any remuneration to the lessor for the occupation of the land since the last preceding gale day. That has been altered by the statute law; and now the tenant is bound to pay a proportion of the rent. In this case, I am of opinion that Mr. Watkins is, by the equity of his contract, bound to pay a proportion of his rent for the period which has elapsed since the last gale day, and during which he has occupied the demised premises. It is said, that in *Creed v. Creed*, the tenant was not compelled to pay any proportion of the rent for the broken gale. Perhaps it was such a short period that it was not worth contending for; but, however that may be, there is no decision of his Honor's contrary to my present opinion: if there were, I would certainly take time to consider this case; but there being none such, and my own opinion being clear upon the matter, I shall declare that Mr. Watkins is liable to pay rent for the period between the 1st of January and the 22nd of May 1841; but I do not say that he is bound to pay rent for that period at the same rate as if he held until the 1st of July; for the occupation of the premises may be less beneficial during that season of the year; and if he desire a reference on the subject, it must be referred to the Remembrancer to ascertain how much, under the circumstances, having regard to the season of the year and the nature of the demised premises, Mr. Watkins ought to pay as the rent for this portion of the gale. Mr. Watkins must also pay the costs of this application, for he distinctly refused to pay this rent; and if he take the reference, it must be at his own expense.

The case was ordered to stand until the next day, to give Mr. Watkins an opportunity of considering whether he would take the reference offered or not; but it was not mentioned again.

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LESLIE ACHESON, *Plaintiff*;
 THOMAS HODGES, Public Officer of the
 Agricultural and Commercial Bank, *Defendant*.

CAROLINE WHITE, *Plaintiff*;
 Same, *Defendant*.

May 14, 18.
 June 12, 26.

(In the Rolls.)

Upon a creditor's bill founded on the equity of 33 G. 2 (Bankers' Act), against the Public Officer of a Joint Stock Banking Company, consisting of a very large number of persons incorporated and registered pursuant to the provisions of 6 G. 4, c. 42, the bank having stopped payment, an injunction to restrain the Directors, &c., from interfering, and a receiver to collect the joint property, &c., appointed before answer, the defendant having made an affidavit for the purpose of resisting the motion, and going into the merits of the case. Form of the order: authority and duties of the receiver—his recognizance and sureties, and remuneration.

THE bills in these causes were, in form, little more than copies of the bill in *Fawcett v. Hodges* (stated at length *ante*, p. 232), excepting, of course, the statement of the particulars of demand, and that in that case the several Directors of the Bank were made co-defendants with the Public Officer, and in these the Public Officer was the sole defendant.* Some time in the month of April 1841, a motion was made on behalf of the plaintiff in the first cause, shortly after the filing of the bill, for an injunction and receiver as prayed; and it then appearing that in *Fawcett v. Hodges* the plaintiff's demand and costs had been paid, and that there was a prospect of the Bank speedily paying off the demands upon it, it was ordered upon consent that the motion should stand over until the first day of Trinity Term, in the hope of an amicable settlement in the mean time. However, the bill in the second cause was filed on the 30th of April 1841, and now (May 14th) a similar application to the foregoing was made on the part of the plaintiff in the second cause, on whose behalf it was alleged that the bill and motion in this cause were necessary, as it appeared that the subject of suit in the first cause was a sum of £155, of which £134 was the amount of the Company's notes held by the plaintiff Acheson when the Bank stopped payment, and in respect of which he afterwards took from the Directors endorsements of bills of exchange made by solvent persons, and the remaining £25 being the amount of the Company's notes which had come into his hands after

* *Fawcett v. Hodges*; S. C. 1 Flan. & Kel. 100, and there reported as if Hodges was the sole defendant, but such was not the state of the record on the argument of the demurrer. The fact of the several Directors being co-defendants with the Public Officer was one of the grounds of objection to the bill stated in the argument, although not much relied upon nor noticed in the judgment of the Master of the Rolls. Shortly after the decision in that case, the plaintiff was paid the full amount of his demand and costs, and the bill was dismissed.

the Bank stopped payment; and therefore his demand might be impeached, and his title could not be relied upon. But Acheson's Counsel insisted that the bills were taken only as collateral securities; and even supposing the transaction respecting them to have been intended as an exchange of securities, it was void by virtue of the provisions of the 33 G. 2, c. 14, which disabled the Company from legally making such an exchange after the stoppage of payment had taken place; that the bills had been returned, and there being no fraud on Acheson's part, his original title was unprejudiced; *Jacques v. Golightly* (a); *Jacques v. Withy* (b); *Murray v. Palmer* (c); *Crowe v. Ballard* (d); *Dun Navigation Company v. Midland Railway Company* (e); and, therefore, if the Court should now make the order sought, it should be as upon the motion in the first cause.

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Mr. J. H. Blake, Q. C., Mr. Monahan, Q. C., and Mr. Shortt, for the plaintiff in the first cause.

The *Solicitor-General* (Mr. Richard Moore) and Mr. Wm. Smith, for the plaintiff in the second cause.

Mr. Blackburne, Q. C., Mr. T. B. C. Smith, Q. C., and Mr. James Dwyer, for the defendant.

For the motion.—The Court having, after very full consideration of the question in *Fawcett v. Hodges* (f), decided that the 33 G. 2, c. 14, was not repealed by the 6 G. 4, c. 42, and that the former act applies to Joint Stock Banking Companies incorporated and registered under the latter; and that decision having been acquiesced in and unquestioned,

(a) 2 Blackst. 1073.

(b) 1 H. Blackst. 65.

(c) 2 Sch. & Lef. 474.

(d) 1 Ves. jun. 214.

(e) Nich. Hare & Car. 135.

(f) *Ante*, 232. Much of the argument in the present case had already been urged and reported in *Fawcett v. Hodges*, and it has been therefore deemed unnecessary to repeat it here. Neither in that case nor in this, was the fact noticed that the 33 G. 2, c. 14 is expressly saved by the 1 W. 4, c. 47, s. 13. As to the question of parties, see *Walworth v. Holt*, 2 Beav. 541, n., and the case of *The Society for the Illustration of Practical Knowledge v. Abbott and others*, *ibid.* 559; and as to the Public Officer of a Joint Stock Bank, registered under 6 G. 4, representing the Company for the purposes of the trust created by the 33 G. 2, see *Vernon's case*, 5th resol. 4 Co. p. 4, where Lord Coke says – “It is frequent in our books that an act made of late time shall be “taken within the equity of an act made long time before,” and gives a variety of examples. However, the practicability of the trust in the case of such a Banking Co-partnership as that of the Agricultural Bank, and the propriety of a suit framed like the present, seem to depend upon the fact of the joint property being sufficient to satisfy the joint debts.

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it follows as of course that an injunction and receiver as sought ought to be awarded; and the only question that can be raised upon the present motion is, whether the Court will do this before answer.

The defendant has made an answering affidavit, which the Court will treat as an answer for the purposes of the motion: *Jervis v. White* (a). He has thereby sought again to raise the questions already discussed and decided in *Fawcett v. Hodges*, and states that the reports published in the Gazette and Dublin Newspapers of the affairs of the society, and representing them as in a most prosperous and affluent condition with a large surplus fund just before the Bank stopped payment, were not published by his authority; and that, if published by the authority of any of the Directors, they were not intended to obtain false credit or to deceive the public. He further insists, that inasmuch as the Bank has only declined meeting some of its engagements *for the present*, and has not *wholly* ceased to pay, but, on the contrary, is calling in its assets as quickly as possible, and has paid off £220,000 since the 18th June 1840, it cannot be said to have stopped payment within the meaning of 33 G. 2.

We submit that it is a mere trifling with words to say that the Bank did not stop payment on the 18th of June 1840; and one of our grounds of complaint is, that since that day the proceedings of the Directors have been wholly without authority, and illegal by virtue of the 33 G. 2;—that there is no security that the very large sum of money said to have been paid away may not be demanded and enforced a second time;—that the Directors have been giving undue preference to particular creditors, and not administering the fund equitably; and that neither the shareholders in the Company nor their creditors have any security for the due application of the funds by the Directors. Upwards of two hundred actions at law have already been commenced against the Public Officer; and it is certainly not less the interest of the Company than of its creditors that a stop should be put to this wasteful litigation, and that this Court should at once take into its own hands the administration of the funds. Irreparable injury is likely to ensue if a receiver be not now appointed.

Against the motion.—An application in all respects similar to the present was refused in *Fawcett v. Hodges*.

[MASTER OF THE ROLLS.—The circumstances were different. It had not then been decided that the 33 G. 2 applies to Joint Stock Banking Companies registered under 6 G. 4, and the motion involved the settlement of that question. I have since decided it upon demurrer; and while my decision remains unreversed, I think I am bound to carry it out.]

It was the intention of the Directors to have carried the question to the House of Lords, when a member of the Company, hoping thereby to get rid of it altogether, paid off the demand and costs of the plaintiff in that cause. If it be true that the 33 *G.* 2 applies to the Agricultural Bank, and that all legitimate authority on the part of the Directors and Public Officer to call in the funds of the society ceased on the 18th of June 1840, it may be asked, what authority could a receiver of this Court have to make effectual the terms of the partnership deed, and raise funds by a call upon the members of the society, where, by the terms of the deed in question, such call can be made and enforced only by the Public Officer? or what title should such receiver have to bring actions or levy any portion of the assets of the society, if the office and authority of the Public Officer are defunct? In such case no portion of the funds could be leviable, and there would be no remedy. The debtors of the Bank could not be compelled nor advised to pay to the receiver of this Court, who could not give a valid discharge.

[MASTER OF THE ROLLS.—I cannot admit that there is any such difficulty in this case. If, after the orders of this Court should have been served upon the debtors of the Bank, requiring them to pay to the receiver the sums due from them to the Bank, they should be advised to refuse such payment, they should, in my opinion, be further advised to be prepared, immediately after such refusal, to be lodged in jail.]

According to the argument upon the other side, there is no person in whose name an action could be brought for the purpose of realising the fund. We say that the Public Officer of the Bank can sue and may be sued under the 6 *G.* 4, and no case can be cited in which this Court has interfered by the appointment of a receiver for the purposes of a trust which, if at all existing, must be admitted to be impracticable in its nature, while, on the other hand, there is an easy, summary, and unquestionable remedy at law. The suggestion as to the fund being in danger is quite vain, and so far would the interference of this Court be from putting a stop to wasteful litigation, it must have the directly contrary effect: for while this Court cannot deprive any of the creditors of the Bank who may be disposed for litigation, of the right given to them by the 6 *G.* 4, of suing the Public Officer and of obtaining judgment and execution against the members of the Company, it must have the effect of compelling the great body of the creditors, who are friendly and willing to give time, to come in and prove their demands, and put the society and the fund to the enormous cost of their doing so. It is impossible to avoid believing that this is a merely speculative suit, not *bonâ fide*, and chiefly seeking to make costs.

In reply.—The case of *Wood v. Hitchings* (a) was cited as to the

(a) 2 Beav. 289.

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jurisdiction of the Court to appoint a receiver, and as to the authority of such receiver when appointed, even though there was not at present existing any person in whose name actions could be brought. Several unreported cases were also mentioned to the same point.

May 18.

MASTER OF THE ROLLS.

[After stating the facts already set forth, and observing that the demand of the plaintiff in the first cause was questioned upon the grounds above mentioned, but that the title of the plaintiff in the second cause was clear, his Honor proceeded to deliver his judgment to the following effect]:—

It is objected to this motion that it is before answer; but the defendant has filed affidavits going into the merits, and answering the affidavits made by the plaintiff, and I have no doubt that I may now grant an injunction and receiver, if the facts disclosed upon the affidavits appear to me to call for such an interference of the Court. In the case of *Vann v. Barnett (a)*, there was a motion for an injunction and receiver before answer or appearance of the defendant, grounded, as in the present case, upon very strong affidavits on the part of the plaintiff. The defendant filed answering affidavits to resist the motion, and the Master of the Rolls held the answering affidavit to amount to an appearance, and granted the motion, saying, that although a motion for a receiver before answer was unusual, yet, had it been necessary, he would have made a precedent. In *Jervis v. White (b)*, the plaintiff was induced to enter into a partnership and advance a sum of £1800, by means of an advertisement in the newspapers, representing the partnership concern as producing an annual profit of £7000, when the whole value of the concern did not in fact exceed the sum of £150; and a bill having been filed for a dissolution of the partnership, and for an injunction against issuing securities in its name, there was a motion before answer, that the defendant, who was the co-partner, should bring into Court the money advanced by the plaintiff. The defendant made an answering affidavit, and Lord Eldon said, "I think I am at liberty in this case to fasten on the affidavit of the defendant as Lord Kenyon did in *Vann v. Barnett*, where it was held that, in general, the Court will not deal effectually between the parties until the answer comes in; yet, if the defendant answers the affidavits, the Court will look at his affidavit as if it was an answer. This is not a distinct admission of a sum of money in the defendant's hands; but upon the two affidavits, and the defendant having undertaken to give an explanation, he is in a situation in which an executor very often is." His Lordship then granted the motion, and said, "I go this length upon the ground of fraud." Therefore, where, as in the present case, the

(a) 2 Bro. C. C. 158.

(b) 6 Ves. 738.

defendant files an answering affidavit, the Court may treat it as an answer; and there are numerous authorities which shew that in cases of fraud or danger the Court will grant an injunction and receiver before answer, even though the defendant may not have filed any affidavit (a).

It is stated in the affidavit verifying the bill, and not satisfactorily denied, that a report was published in the newspapers as to the stability of the Company, calculated to induce persons to give it credit,—holding out statements of a large surplus fund,—and yet the Bank stopped payment within two months after the report appeared. It is not alleged that such was a true statement. It is admitted that in October last more than one-fourth of the capital had been lost, and it is not alleged that this occurred since the report was published. The present case therefore appears to resemble *Jervis v. White*, in which Lord Eldon proceeded upon the ground of fraudulent misrepresentation, but I need not adopt that as the exclusive ground of the order I am about to pronounce.

In *Fawcett v. Hodges*, I held that the 33 G. 2, c. 14, applies to Joint Stock Banking Companies registered under the 6 G. 4, c. 42, and I further came to the conclusion that what had occurred on the part of the Bank was a stoppage of payment within the meaning of the former act. I am of opinion that by virtue of the 33 G. 2, a trust was created for the creditors when the Bank stopped payment; and being of that opinion I cannot refuse a creditor, who makes a proper case for it, the relief which I believe him to be entitled to in virtue of the trust. If it be improvident on the part of the creditors of the Bank to adopt a proceeding whereby the extensive and complicated concerns of such an establishment are to be brought into the Court of Chancery, they must be the sufferers. Where the right exists, I cannot refuse the remedy: it is for the creditor to determine as to the prudence of the proceeding. I agree with the observation of the plaintiff's Counsel that they have a right to complain of the fact on which the defendant relies, namely, that since the 18th of June 1840, debts of the Bank to the amount of £220,000 have been discharged: for this is a direct violation of the 8th section of 33 G. 2, which provides that immediately after the stoppage of payment all the real estate, and all the personal estate, credits and effects whatsoever either at law or in equity of which such bankers shall be seized, possessed of, or entitled to at the time of stopping payment, shall be liable to payment of all debts *without priority or preference*; and, therefore, the creditors who have been paid their demands, have got that to which they were not entitled. Again, it is stated by the defendant that, since

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(a) See *M'Swiney v. Haynes*, 1 Ir. Eq. R. p. 322; *Dewhurst v. Wrigley*, C. P. Coop.; see, also, *Middleton v. Dodswell*, 13 Ves. 266; *Lloyd v. Passingham*, 16 Ves. 59; *Duckworth v. Trafford*, 18 Ves. 283; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; *Brodie v. Barry*, 3 Mer. 695; *Scott v. Beeker*, 4 Price, 346; *Tanfield v. Irvine*, 2 Russ. 149; *Maguire v. Allen*, 1 Ball & B. 75; and see 2 Swanst. 138, n.

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the stoppage, a committee has been appointed to collect the debts and to wind up the concern. This, also, is contrary to the provisions of the 33 G. 2.

It has been contended by the defendant's Counsel that this Court ought not to interfere because, as it is said, of the inconvenience which must ensue from such interference; and it is argued that in such a case as the present the administration of the trust created by the 33 G. 2, would be impracticable. But I do not think that there will be any such inconvenience or insuperable difficulty in the way of having the concerns of the Bank wound up in this Court, or in realising the assets by means of a receiver. The Company have a great number of actions at law pending against them at present, and I cannot help thinking that the waste and loss which may be occasioned by the multiplied costs of such actions, is much more to be feared than the proper and necessary expense of a suit like the present.

As to the authority of a receiver appointed by this Court to collect the assets, I have no doubt whatever; and I was not a little surprised upon the motion to hear it questioned by Counsel. In *Wood v. Hitchings* (a) the same objection was made as in the present case, and Lord Langdale asked "Is there any case in which the Court has refused to appoint a receiver pending a litigation in the Ecclesiastical Court, on the ground that there was no legal personal representative? Has this Court ever allowed a person who admits a sum of money to be due from him to an estate, to dispute the right of a receiver to collect it?" Again, he said, "He could not permit any doubt to be entertained respecting the jurisdiction of this Court in a case of this description. That it was perfectly clear to him, that the Court had jurisdiction to interfere by granting a receiver for the protection of the estate, and that it was not necessary in order to authorise the Court to appoint a receiver, that there should be a person in whose name an action might be brought to recover the property." A receiver was accordingly appointed, and the decision was affirmed by the Lord Chancellor on appeal. It is the daily practice of the Court to appoint receivers over real estate, and to order the tenants to pay their rents to the receiver, although those rents are in fact debts founded upon contract, and there may be a dispute as to the person entitled to them. It is also a common exercise of the undoubted jurisdiction of this Court to appoint sequestrators and receivers of personal estate under similar circumstances. It is not necessary in a case of this kind, that there should be a person in whose name actions could be brought against the debtors of the estate: if the debt be not disputed the Court will enforce payment of it by a summary order; and if disputed, it can direct inquiry by a feigned action.

(a) 2 Beav. 294-5; see, also, *Thomas v. Thomas*, ante, vol. 2, p. 109.

I am of opinion that this case is ripe for the appointment of a receiver, and that the present motion should be granted,—first, because the Court will act on the defendant's affidavit as an answer; secondly, on the ground of fraud, and danger of the loss of the assets; and thirdly, because, having re-considered my decision in *Fawcett v. Hodges*, I abide by it, and think I am bound to give to the creditors of the Bank the protection afforded to them by means of the trust created in their favour by the 33 G. 2. Therefore, my order is in both cases, that an injunction do issue as desired, and that it be referred to the Master to appoint a receiver.

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The defendant appealed to the Lord Chancellor against the foregoing order, and on or about the 29th of May 1841, the case having been opened before his Lordship, and it being stated that there were several matters of defence not set forth in the defendant's affidavit, which was hastily prepared to resist the motion in the Rolls, it was ordered upon consent that the appeal should stand over, with liberty to the defendant to file his answer, he undertaking to do so within a week; and that upon the coming in of the answer, the plaintiff should move in the Rolls to continue the injunction upon equity confessed; and, in the event of the Master of the Rolls continuing the injunction, that the defendant should be at liberty, if so advised, to renew the appeal motion, relying upon his answer.

The defendant's answer having been filed pursuant to the terms of the Lord Chancellor's order, Counsel for the plaintiff now moved the Master of the Rolls to continue the injunction upon equity confessed in the defendant's answer. His Honor, after hearing the answer, intimated his intention of continuing the injunction; but, it being clearly shewn by the answer, that the reports published in the newspapers in April 1840, were *bonâ fide*, and consistent with the true state of the accounts at the time; that the subsequent embarrassment, loss of capital, and stoppage of payment arose from a sudden and unexpected pressure;—that, the only *preference* which had been intentionally given, was to the small-note holders who almost entirely belonged to the labouring classes;—that, since the 19th of June 1840, £220,000 had been paid off, and that of all the Company's notes, those now remaining in circulation amounted to no more than £9,900;—that, before any call could be made upon the members of the Company, pursuant to the terms of the partnership deed, for their contributions to meet the joint liabilities, it was necessary to convene a public meeting of which twenty-one days' notice should be given;—that a public meeting was convened as soon as possible under the circumstances, and a call made, but that time allowed by the deed to the out-members of the Company residing in England and Scotland, for paying in, had not yet expired; and in consequence of the reports that

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had got abroad, there had been much difficulty in inducing the home members to answer the call which had been made upon them, and that there could be no rational fear of any creditor of the Bank not being fully paid in a little time—the Master of the Rolls acceded to several suggestions offered by the defendant's Counsel as to the proper person to be appointed receiver, and the nature of his duties when appointed; in consequence of which, the following order was agreed upon, and the appeal pending before the Lord Chancellor was abandoned.

ORDER:—That John Magrath of the city of Dublin, the general accountant of the said Company, who has been named by the defendant and the Committee and Directors of said Company to the Court, as a fit and proper person to be appointed Receiver in these causes, be, and is hereby appointed such Receiver, on his giving such security for the due discharge of his duties as such Receiver as is hereinafter mentioned. And that the said John Magrath do, after he shall have enrolled his recognizance and the recognizances of his sureties, proceed to collect and receive the outstanding assets of, and debts due to the said Company; and accordingly, it is further ordered, that the said John Magrath do give security by his recognizance, with sufficient sureties, to be approved of by William Henn, Esq., the Master in this cause, in the sum of £20,000 conditioned for the due discharge of his duties as such Receiver. And it is further ordered, that he be allowed to give such security by the recognizance of ten sufficient persons, each being bound in the sum of £2000, or by any lesser number of sufficient persons not less than two, bound in the whole in the joint sum of £20,000 in recognizances conditioned as aforesaid; and accordingly that the Master do settle and approve of the form of such recognizances, having regard to the terms of this order, which imposes duties on such Receiver, varying in some manner from the duties to be discharged by other Receivers. And it is further ordered, that the said Receiver be at liberty after he shall have enrolled such recognizances with the concurrence and sanction of the Master, and for the purpose of the effectual discharge of his duty as such Receiver, to employ or continue to employ such clerks and agents as may be necessary and proper for the due collection of said assets, and to pay all necessary and proper outgoings for such purpose as approved by the Master, and any necessary rent of offices for the business of the Company, and the effectual collection of the remaining assets of the Company; and that said Receiver do submit to the Directors and Committee of said Company, a statement of the number of clerks and agents to be

so employed, and of the salary to be paid to each of them, and of the amount of rent to be so paid before the same shall be submitted to the Master. And it is further ordered, that the said Receiver do keep an accurate account of such outgoings and disbursements, and include same in the account to be rendered by such Receiver as hereby directed. And it is further ordered, that the said Receiver shall be at liberty, if the Master shall consider it to be for the benefit of the parties interested in the assets of the said Company, to sell all the debts due to the Company, for which they have security by bonds, judgments, rent-charges, assignments of rents or mortgages—such sale to be had after the enrolment of the said recognizances, and with the sanction and concurrence of the said Directors and Committee, and to be by public auction, before such person and at such time and place as the Master shall direct after giving due public notice, and that the said Receiver be at liberty with such concurrence of the said Directors and Committee and the sanction of the Master to sell the interest of said Company in any of the houses or offices in which the business of the said Company or any branch thereof was carried on, which may not be required for the collection of the Company's assets, or to surrender the same in case it shall be deemed expedient so to do, and that the produce of all such sales be paid to the said Receiver, who is to account for the same, and is hereby authorised to give effectual discharges for the purchase-money; and that such of the Directors or members of the said Company as the Master shall direct, or the Public Officers of the said Company if directed by the Master, do execute proper assignments of such debts, and the securities for the same, and the interests in the said houses to the purchasers thereof. And it is further ordered, that the said Receiver shall be at liberty after he shall have enrolled such recognizance to enter and cause to be served an order of this Court, requiring the debtors to said Company by bills of exchange, promissory notes, judgments, mortgages, calls for instalments or other liabilities, to pay to the said John Magrath the sums due by them respectively to the said Company, and that said John Magrath do give acquittances and proper discharges for all such sums as he may receive in pursuance of such order, and account for the same in his accounts. And it is further ordered, that said Receiver shall from time to time, when, and as soon as he shall have received and have in his hands as such Receiver, sums amounting to the sum of £500, invest the same in three per cent. consols, with the approbation of the said Master, and transfer the same to the credit of these causes with the privity of the Accountant-General of this Court, and that the said defendant or the Directors

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or Committee of said Company, be at liberty from time to time to submit to the Court such statement or plan for the distribution among the creditors of the said Company of the funds to be so collected, as may be considered most beneficial to the creditors, and just; previously to the application for the distribution of such fund as aforesaid. And it is further ordered, that the Master do fix and report what would be a reasonable salary and remuneration in lieu of poundage, to be paid to the said John Magrath as such Receiver (a). And it is further ordered, that the order heretofore made in these causes on the 18th day of May 1841, be varied so far as the same is inconsistent with the directions hereby given; and that the said Receiver do after he shall have enrolled said recognizances, cause a notice to be served on the several creditors of said Company, who are taking or about to take proceedings for recovery of their demands against the said Company, or any member thereof, or the Public Officers of the said Company, apprising them of the terms of this order, and that the several persons claiming to be creditors of the said Company, be at liberty to furnish to the said Receiver the amount and particulars of their respective demands, and that same be when furnished classed and arranged by the said Receiver, to be submitted to this Court. And it is further ordered, that said Receiver may, after he has enrolled said recognizance, proceed with the sanction of the said Master, and the concurrence of said Directors and Committee in the name of the Public Officer of the Company or otherwise, as the Master shall direct, to sue for the debts and calls due to said Company, and that he be at liberty, in case the Master shall so direct, to pay the costs of any proceedings heretofore taken against the said Company by the creditors thereof, on the terms of such creditors staying or discontinuing such proceedings, and to defend with the sanction of the Master, any action or suit brought against the said Company, or any member thereof; and that he be at liberty with the sanction of the Master, to pay to the plaintiffs the amount which may be due to them on the foot of their respective demands; such payment to be without prejudice to any question, as to the costs of the suits so instituted by them; the said plaintiffs upon such payment being made to them as aforesaid, to give up to said Receiver the vouchers and securities held by them respectively from said Company for their said respective demands, and in the pleadings mentioned; the said Receiver acting as aforesaid, to be at liberty from time to time to apply to the Court as may be proper, necessary, and expedient, for the effectual discharge of his duty as aforesaid.

(a) See *Day v. Croft*, 2 Beav. 488.

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The Most Noble HOWE PETER, Marquis of SLIGO,
Petitioner ;
Sir SAMUEL O'MALLEY, Bart., . . . *Respondent.*

MARGARET CARNEY, . . . *Petitioner ;*
Sir SAMUEL O'MALLEY, Bart., . . . *Respondent.*

May 27.
June 7.

THE petitioners in these matters were judgment creditors of Sir Samuel O'Malley, and sought the appointment of a receiver over his estate under the 5 and 6 W. 4, c. 55. The judgment in the first matter was obtained in the year 1826, to secure the principal sum of £3000 with interest ; and the entire principal sum and an arrear of interest were now due upon it. The judgment in the second matter was obtained in the year 1808 in the penal sum of £1000, to secure £500 of the then currency, with interest, and there was now due upon it the sum of £568. 8s. 3d. of the present currency.

On the petition of Lord Sligo, Mr. A. C. Lambert was absolutely appointed receiver over certain lands, part of the estate of Sir S. O'Malley, by order, bearing date the 4th of March 1840 ; and was absolutely extended to the matter of the second petition, by an order bearing date the 21st of November 1840.

On the 17th of May, instant, the receiver passed his account, whereby it appeared that the rents due on the 1st of May and 1st of November 1840, had been received by him, and that the November rents were not received until after the order extending the receiver to the second matter. The sum of £1069. 0s. 4½d. was the ascertained balance in the receiver's hands.

A motion was now (May 27) made on behalf of Lord Sligo, that the receiver might be directed to pay over to him the said sum of £1069. 0s. 4½d., in part payment of his demand, and that the said receiver might have credit, &c. At the same time, the petitioner in the second matter moved on a cross-notice, that out of the said sum of £1069. 0s. 4½d. in the receiver's hands, he might be directed to pay her the sum of £534. 10s. 2d. (being the net amount of the gale of rent due on the 1st of November 1840), on account of the said sum so due to her for principal, interest, and costs, &c.

Mr. Baker, for Lord Sligo.—The question raised in this case turns upon the construction of the 38th section of the Sheriffs' Act, whereby it is enacted, that " In case any sum shall be received by any such receiver, before an order shall be made to extend him to the matter of " another petition, the money, so received by him, shall be distributed

A receiver appointed over lands on a judgment creditor's petition under 5 & 6 W. 4, c. 55, collects the arrears as well as the accruing rents ; but the petitioner's right is analogous to that of an *elegit* creditor proceeding at law, and attaches only the rents accruing after the appointment of the receiver ; the arrears being collected for the debtor, in order to prevent the inconvenience of two receivers over the same premises.

In this Court, the order extending a receiver from the matter of one petition to that of another, is absolute in the first instance, but it attaches only the after-accruing rents, and not those which had accrued due before, although received after such order was pronounced.

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"and paid under the orders of the Court, as it would have been if such further order extending him had not been made; but in distributing the funds thereafter to be received, the Court shall have regard to the *rights* of the person or persons at whose instance the order extending the receiver was made." Now, the *right* of a petitioner under this act is strictly analogous to that of an *elegit* creditor proceeding at law, who is entitled only to the rents accruing after the day of the demise in the ejectment. The appointment or extension of a receiver under this act, is in lieu of the award of an *elegit*, and accordingly attaches the after accruing rents only. In the present case, although the judgment in the second matter is prior to that in the first, the right of priority does not attach the fund now in Court, as it is the amount of rents which had accrued due before the receiver was extended: therefore, Lord Sligo is entitled to the order which he seeks.

Mr. *O'Dowd*, for the petitioner in the second matter.—The 38th section of the act plainly means that whenever a receiver is extended from one petition matter to another, the rents received after the extending order shall be paid according to priority. The argument on the other side, resting on the word '*rights*,' fails; because, as the law stood upon the passing of the 5 and 6 *W.* 4, c. 55, there was not a strict analogy between the right of the petitioner under this act, and that of an *elegit* creditor proceeding at law: the petitioner being entitled to a receiver over the whole or a competent part of the debtor's estate; whereas the *elegit* creditor could take a moiety only (*a*). *Barry v. Wilkinson* (*b*) is an authority precisely applicable to this case.

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I have read that case two or three times, and I cannot help thinking that, although there was a good deal of discussion, very little was decided in it.

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[After stating the applications in this case, and the facts as already set forth, his Honor proceeded to deliver his judgment to the following effect]:—

On behalf of the petitioner in the second matter it is contended, that according to the true construction of the 38th section of the 5 and 6 *W.* 4, c. 55, where a receiver is appointed on the petition of a *puise* judgment creditor, and afterwards extended to the matter of a prior judgment, the prior judgment creditor is entitled in priority to the rents received after the extension of the receiver, although those rents accrued

(*a*) See 3 & 4 *Vic.* c. 106, s. 19.

(*b*) *Ante*, p. 121.

due before the extending order was pronounced; and a decision of the Court of Exchequer, in *Barry v. Wilkinson* (a), is referred to as an authority in point.

I do not think that the decision in *Barry v. Wilkinson* applies to the present case. The question there was, whether the conditional order or the absolute order for the original appointment or subsequent extension of a receiver, is *the* order for the purpose; and the Court decided that the conditional order is *the* order, if afterwards made absolute,—or in other words, that the absolute order relates back to the time at which the conditional order was pronounced. No question of that kind arises in this case, as there is a difference between the practice of the Court of Exchequer and this Court, respecting the extension of receivers—the extending order in that Court being conditional, but in this, absolute, in the first instance; and I have reason to know that it was not intended by the Court of Exchequer to decide that an order extending a receiver to the matter of a prior judgment attaches, as against the petitioner upon whose application the receiver was originally appointed, rents due but unpaid at the time the extending order was pronounced. The object and intention of the act was to give an easier remedy, not a new right. It directs that the receiver appointed under it, shall collect the arrears as well as the rents accruing after his appointment, because of the confusion and mischief which must ensue if there should be two receivers at the same time, the one enforcing old arrears, and the other, rents subsequently due; but it does not declare that the arrears so to be collected shall be applied in payment of the petitioner's demand, nor give any larger right than that of a judgment creditor issuing an *elegit*, and proceeding at law. Upon such proceeding, it is held that the creditor cannot get the rents due prior to the day of demise in the ejectment; and, therefore, in proceeding under this act, he can have only the rents accruing after the appointment of the receiver, and the arrears are collected for the debtor if he thinks proper to apply for them. In like manner, upon the extension of a receiver to the matter of a prior judgment, the *right* of the prior judgment creditor is strictly analogous to what his right would be at law upon disturbing the possession of a puisne creditor: he is entitled to the rents accruing after the date of the inquisition, but not to rents previously due, or, in other words, to the rents which accrue after the extension of the receiver, but not to rents previously due, although received after the extending order. The 38th section of the act directs, that in distributing the funds to be received after an extending order, the Court shall have regard to the *rights* of the person or persons at whose instance the order extending the receiver was made—i. e., to the legal rights already adverted to. Even if it

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should be held, as I think it ought not, that arrears due at the time of the original appointment of the receiver are to be collected for the petitioner, it would not follow that the same rule should be applied as between a first and second petitioner, upon the extension of the receiver to the matter of a prior judgment.

The same question as that now raised I had lately occasion to consider in *Rule v. Henry* (a), and I abide by my decision in that case. I must therefore make the order sought by Lord Sligo, and refuse the motion of the petitioner in the second matter.

(a) 1 Flan. & Kel. 97.

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June 2.

The final decree directed a sale for payment of certain demands and costs according to priority, and as to the defendant A. B., it was ordered that he should have his costs out of the residue, if any. Afterwards, on the plaintiff's motion that A. B.'s solicitor should bring in the title-deeds, &c., in his hands relating to the lands about to

THE bill in this cause sought to recover a legacy bequeathed to the plaintiff by the testatrix Elizabeth Mathews, and also to recover an undivided third part of the lands of Cuffe's-grove, by title paramount to the will. The defendant Rogerson Mathews was devisee for life, subject to debts and legacies, of the testatrix's interest in the lands of Cuffe's-grove, and by his answer, filed by Mr. A. Maxwell as his solicitor, admitted the plaintiff's right to the legacy, but disputed his claim to the one-third of the lands except as to a small rent issuing thereout, and insisted that the entire of the lands were the property of the testatrix. On the hearing of the cause, the defendant succeeded in resisting the plaintiff's claim to the third part of the lands, but there was the usual decree for an account of debts and legacies; and upon the coming in of the Master's report there was a final decree for sale of the lands for payment of the debts and legacies with costs according to priority, and it was ordered that the defendant Rogerson Mathews should have his costs out of the *residue*, if any.

be sold under the decree, it appeared that A. B. was insolvent, that the fund would be deficient, and it was alleged that the costs in the cause for which the solicitor claimed a lien were incurred in proceedings by which the fund distributable under the decree had been increased in a very large degree. The solicitor was ordered to bring in the deeds, &c., but it was referred to the Master to ascertain the sum due to him for costs, and to inquire and report how far they had been incurred in proceedings by which the fund distributable had been increased. The Master reported upwards of £300 to be due to the solicitor for costs of proceedings whereby the fund distributable had been increased by upwards of £10,000. On the solicitor's motion for payment out of the fund of the sum reported due, and for the costs of the reference and of the motion:—*Held*, that the costs in question being in the nature of salvage costs, should have been specially secured by the decree, and that the decree may have been amended in that particular. *Held, also*, that under such circumstances the Court should not have been justified in taking the title-deeds, &c., from the solicitor without requiring his costs to be paid to him, and that, notwithstanding the form of the decree and that the fund was deficient, his motion should be granted.

When proceeding to a sale, the plaintiff moved that Mr. Maxwell, the solicitor of Rogerson Mathews, might be ordered to bring in the title deeds, &c., in his hands, for the purposes of the sale. Maxwell opposed the application, insisting upon his lien for costs in the cause as solicitor of Rogerson Mathews: he stated that, by means of his exertions as such solicitor in resisting the plaintiff's demand of the one-third of the lands, and also in reducing the demands of the creditors of the testatrix, and in realising the assets, the reported creditors and legatees (several of whom, as he alleged, relied upon his exertions upon the taking of the account before the Master) had a very much larger fund for payment of their reported demands than they otherwise could have had, and that the costs in question should be considered as in the nature of salvage costs;—that upwards of a year before the final hearing of the cause, Rogerson Mathews changed his solicitor upon record, and it was alleged (but as to this there were conflicting statements) that upon the final hearing, the facts respecting Maxwell's claim had not been brought under the consideration of the Lord Chancellor; it was therefore insisted that he was not bound by the decree (a), especially as the fund, although greatly increased by his exertions, would still be deficient, and Rogerson Mathews was insolvent. The Master of the Rolls ordered Maxwell to bring in the deeds, &c.; but, under the circumstances, referred it to the Master to inquire and report the sum due to him for costs in this cause, and how far as solicitor, or otherwise acting, on behalf of any and which of the parties the funds distributable had been increased by his exertions to any and what amount; with liberty to him to apply against the fund for such sum as should be found due to him.

Under the foregoing order, the Master reported that by the proceedings of Maxwell, as solicitor of Rogerson Mathews, in resisting the plaintiff's claim of one-third of the lands, and in reducing the demands of the creditors and legatees, &c., the fund distributable had been increased by upwards of £10,000; and that a sum of £300 was due to him for his costs of such proceedings. The plaintiff applied to have this report sent back to be reviewed, upon the ground that the Master had no evidence before him to warrant his finding that the fund had been benefited to so large an amount by Maxwell's exertions; and also upon the ground that the costs reported were not confined to the proceedings from which the benefits proceeded, but included all of Maxwell's costs in the cause and even Rogerson Mathews' costs of the final hearing; but this motion, not being founded on objections to the Master's report, was objected to *in limine*, and failed as of course (b). A motion was now made on the part

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(a) See *Hargrave v. Holland*, 2 Ir. Eq. Rep. 137; *Morgan v. Scott*, *ibid.* 128.

(b) See *In re Lawlers, Minors*, ante, 105, n; *Gregory v. West*, 2 Beav. 541.

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of Maxwell, for his costs as above reported, and the costs of the reference, together with his costs of the present application, making altogether the sum of £350.

On behalf of the plaintiff, an affidavit made to resist the present motion was used. It stated that Maxwell had in fact, though not nominally, continued as solicitor of Rogerson Mathews down to and upon the final hearing of the cause in 1838;—it impugned the findings of the Master as to the extent to which the fund had been benefited by Maxwell's exertions, and imputed to the latter certain negligences in the progress of the cause, by means of which the funds properly applicable were in fact diminished. Maxwell made an answering affidavit explaining the alleged negligences, and sustaining the Master's report, but virtually admitting that he had acted as solicitor for Rogerson Mathews down to the hearing in 1838, and that the costs of that hearing were included in the sum reported to him by the Master.

Mr. Collins, Q. C., and Mr. Thomas Fitzgerald, on behalf of Maxwell.—The granting of the order now sought ought to follow as of course after the order of reference and the Master's report thereunder. Several persons are entitled under the decree as well as the plaintiff, but he is the only one who resists Maxwell's claim.

Mr. Robert Molesworth, for the plaintiff.—The present application is in fact to alter the final decree, the fund being deficient. We say that Maxwell's claim for costs was put forward fully upon the final hearing; and if it was not, it should have been. He cannot be let in now to resist the decree by which the Court is bound. The several creditors and legatees are decreed to be paid their demands and costs according to priority; and it is further decreed that Rogerson Mathews shall have his costs out of the residue, if any. The fund is insufficient for the rights of the creditors and legatees, and now the solicitor of Rogerson Mathews, whose costs were, by the decree, thrown upon the residue, if any, comes in and insists that, notwithstanding the decree, he is entitled to be paid his costs out of the deficient fund for the creditors and legatees. The principal merit upon which he grounds this extraordinary claim is, that the answer of Rogerson Mathews, and the subsequent proceedings upon it, effectually resisted a claim of the plaintiff, obviously made in mistake, to one-third of the lands of Cuffe's-grove. Why should we be called upon to pay him for resisting our demand? He was not our solicitor, nor responsible or liable to us for his proceedings; and even supposing that the alleged benefits resulted to us, they were merely accidental, and can give him no claim whatever as against any other person than his own client, on whose behalf exclusively those proceedings

were taken. The following cases were cited:—*Jauge v. Jackson* (a); *Bonyng v. Griffith* (b); *Duite v. Mumford* (c); *Taylor v. Popham* (d).

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In this case, the plaintiff applied some time since for an order that Mr. Maxwell, the late solicitor of the defendant Rogerson Mathews, should bring in certain title-deeds, in his hands as such solicitor, relating to the lands about to be sold under the decree. Mr. Maxwell resisted the application, upon the ground that he had a lien upon those documents for his costs in the cause; and it being then stated to the Court that the defendant Rogerson Mathews was insolvent, and that the costs in question had been principally incurred in realising the fund and increasing it to an amount greatly exceeding what it should otherwise have been, the Court ordered Mr. Maxwell to bring in the deeds for the purposes of the decree; but at the same time referred it to the Master to ascertain the sum due to Mr. Maxwell for costs in this cause, and to inquire and report how far the fund distributable had been realised and increased by the proceedings in respect of which the costs were due. Under that order, the Master reports a sum exceeding £300 to be due to Mr. Maxwell for costs in this cause, as solicitor of the defendant Rogerson Mathews; and he further finds, that by means of the proceedings in which the costs were incurred, the fund distributable amongst the persons entitled under the decree was increased by upwards of £10,000. Mr. Maxwell now moves, pursuant to the liberty given to him by the former order, for payment out of the fund of the amount of his costs ascertained by the Master, and for the costs of the reference, and of this motion.

The motion is resisted by the plaintiff, on whose behalf it is argued that a solicitor's lien upon his client's papers could not give him any larger right to the possession of them than the client had; that the lien avails only as against the client or those deriving under him, and attaches only such fund as he or they may be entitled to; and that, in the present case, as the client is not entitled to any part of the fund in Court, the solicitor can have no lien upon it; and it is further argued that the decree is decisive, and that I am bound by it.*

(a) Flan. & Kel. 45. See, also, *Loughney v. Dillon*, ante, 55.

(b) 2 Law Rec. O. S. 449.

(c) 2 Y. & Col. 441.

(d) 15 Ves. 72.

* See *Morgan v. Scott*, 2 Ir. Eq. Rep. pp. 134-5; *Yarnall v. Rose*, 2 Keen, 326. A Solicitor's lien on documents does not give him any larger right to the possession of them than the client had; and whenever the latter is bound to deliver them up, so is the solicitor: *Marsh v. Bathoe*, Ridgw. temp. Hardw. 256; *Furlong v. Howard*, 2 Sch. & Lef. 115; *Ex parte Nesbitt*, ibid. 279; *Baker v. Henderson*, 4 Sim. 29; *Bell v. Taylor*, 8 Sim. 216; *Warburton v. Edge*, 9 Sim. 508; *Hutchinson v. Joyce*, 2 Jones, 122; *Plumtre v. O'Dell*, 1 Ir. Eq. Rep. p. 113. As to the difference between a soli-

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The propositions just adverted to, as to a solicitor's lien in general, are very true, but do they apply to this case? The question here is respecting costs in the nature of salvage costs, between which and ordinary costs there is a wide difference. I am satisfied that if, upon the final hearing of the cause, it had appeared to the Lord Chancellor, as it now plainly appears, that the costs in question were, for the most part, if not altogether, incurred in realising a fund of no less than £10,000, which might otherwise have been lost, and that the client was insolvent, those costs would have been specially provided for by the decree; and I have no doubt that upon such a state of facts, the decree may have been amended. Under such circumstances, I think I am not bound by the mere form of the decree, and that I should not have been justified in making the order upon Mr. Maxwell to deliver up the deeds, without requiring his costs to be paid to him. He asks £350 for his ascertained costs of realising upwards of £10,000 for the parties entitled under the decree. His claim is a very meritorious one; and I am clearly of opinion that it would have been much better if it had not been resisted, and that I am bound to grant his present application.

Motion granted (a).

citor's general lien on papers, and his lien on the fund in a particular cause; and also as to the difference between such general or particular lien and an equitable mortgage, see the very important decisions in *Bozon v. Boland* 4 My. & Cr. 354, and *Stedman v. Webb*, *ibid.* 346. A solicitor declining to proceed or be further concerned for his client is not entitled in virtue of his lien to withhold from the client documents necessary to enable him to make his defence. Such documents must be furnished to the client subject to the lien, and upon an undertaking for their return as soon as the purposes of justice have been satisfied: *Rutledge v. Rutledge*, 2 Ir. Eq. Rep. p. 290, and the cases there cited; see, also, *Cane v. Martin*, 2 Beav. 584. As to the effect of taking security, see *Brownlow v. Keatinge*, 2 Ir. Eq. Rep. p. 243, and the cases there cited.

(a) See the case of *Hall v. Laver*, 4 Y. & Col. 216.—As to the distinction between the costs of making out title or realising the fund in a creditor's suit, and the ordinary costs of a party, see *Maguire v. Dundass*, 1 Ir. Eq. Rep. 25; *Kelly v. Kelly*, *ib.* 317; *Gray v. Crawford*, *ib.* 274; S. C., Jo. & Car. 174; *Drake v. Ford*, *ante*, 56.

How far an error of either the positive or negative kind in a decree may be amended (*i. e.*, rectified upon motion without a bill of review or re-hearing of the cause), does not seem to be very clearly stated in the text books. However, it appears to be settled, at least in this country, that a decree may be varied on motion as to a matter of costs: *Connell v. Frith*, 1 Ir. Eq. Rep. 82; *Atkins v. Lord Doneraile*, 3 Law Rec. N. S. 13. The decision in *Coleman v. Sarrell*, 2 Cox, 206, may, as it is conceived, be doubted. It is now settled that in certain cases there may be an appeal upon the mere question of costs: *Angel v. Davis*, 4 My. & Cr. 360; *Church v. Nugent*, 1 Dr. & W. 229; and if there may be an appeal to a different Court, it seems to follow as of course that there may be a re-hearing by the same Court, although it must be admitted that there is nearly the same technical objection to such a re-hearing as to a revivor for costs: see the cases collected in *Beames on Costs*, 2nd edit. p. 126, and the observations of Lord Eldon in *Hannam v. South London Water Works Company*, 2 Mer. 65. If the distinc-

tion between the primary or principal and the secondary equities, and the principal and secondary jurisdictions of the Court (suggested in the note to *Hutchins v. Hutchins*, ante, pp. 231, *et seq.*) be well founded, as the Reporter believes it to be, it would follow clearly that an error in a decree as to a matter of costs, although it were an error in principle, may be rectified, and that the correction should properly be made not upon a re-hearing but upon a motion to amend, as in *Connell v. Frith*. As to the very important decision in *Hackett v. Donnelly*, 1 Ir. Eq. Rep. 231, which was a motion, not to amend a decree, but for relief which the decree should have given, and, by a clearly accidental omission in the report on which it was founded, did not,—the motion being in another cause to which the residue of the fund had been transferred—it would be impossible, consistently with the purpose of this note, to do much more than direct the reader's attention to it. Perhaps it will be found upon examination to turn upon a different principle from that of varying a decree, and to have a close analogy to the case of *Glenny v. Murdock*, ante, 443, where there was a disclaimer by mistake; and after decree, the mistake being discovered, the defendant sought leave to file a supplemental answer, stating her newly-discovered right to the surplus, if any, after payment of the plaintiff's demand; and the Court held that such supplemental answer contradicting the disclaimer *could not be permitted after decree*, but that as the decree directed an inquiry as to the surplus and the persons entitled to it, the defendant, having disclaimed by clear mistake, should be at liberty to go into the office as a third person or other creditor going in under the decree, and obtain a report in her favour.

It is clear and too well settled to be doubted, that after a final decree, the *principle* according to which the Court has adjudicated upon the subject-matter of the suit, however erroneous, cannot be varied except upon a re-hearing of the cause, or upon a bill of review and reversal if after the enrolment of the decree. But as the settlement of the *principle* of decision is the proper judicial determination to which all the rest is merely ministerial, if, consistently with the admitted principle of the decision, there is a failure of justice and an error in the decree, even as to the subject-matter of the suit, by means of a clerical blunder or clearly accidental omission or other mistake in the ministerial office of the Court—*e. g.*, in the taking of the account which the final decree adopts, upon the supposition that it is in exact accordance with the principle and directions of the previous interlocutory decree upon which it proceeded—such error, it seems (provided it clearly appears), may be amended upon motion: for this cannot properly be said to be altering the decree, but merely giving to it the form and effect which it was clearly intended to have had. See *Hackett v. Donnelly*, *ubi sup.*; *Manaton v. Molesworth*, 1 Eden, 18; *Williams v. Jones*, M'Clel. 96.

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JOHN MALONE, of Rathcaslin, in the
County of Westmeath, . . . *Appellant* ;
JOHN MALONE, of Coburg Place, in
the County of Dublin, and others, . . . *Respondents.*

(House of Lords.)

When a plaintiff claims to be entitled to a property under an alleged trust in a will, created for those filling a certain character, which he alleges that he sustains, it is in the discretion of the Court whether it will first decide the question whether there is any such trust, or put the petitioner to establish the character in which he sues in the first instance.

In ordinary cases, the proper course is to ascertain the question of fact in the first instance.

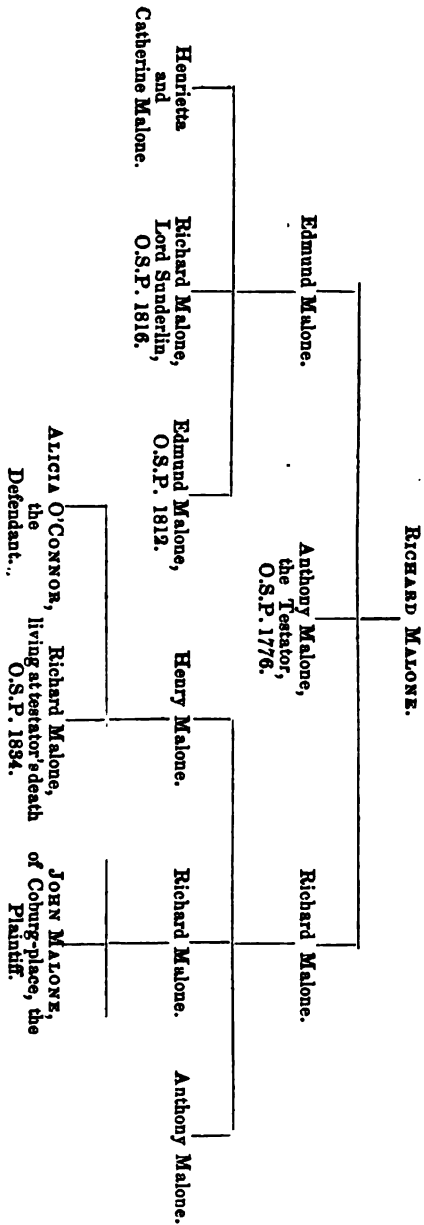
THE Right Honorable Anthony Malone being seized in fee-simple of certain estates which he had acquired himself, and being seized, under the will of his father Richard Malone and his own marriage settlement, of certain other estates for life, with remainder to his nephew Richard Malone (afterwards Lord Sunderlin) in tail male; and being also seized under the said will and settlement of certain other estates in tail male, with like remainder to his nephew Richard Malone in tail male, made his will, duly executed, &c., on the 12th July 1774, in the words following:—"It is my will, and I do accordingly devise all my real and "freehold estates of my own purchase or acquisition, or over which I "have any power or dominion enabling me to dispose thereof, situate in "the counties of Westmeath, Roscommon, Longford, Cavan, and the "county of the city of Dublin, or elsewhere in the kingdom of Ireland, "unto my nephew Richard Malone, the eldest son and heir of my lately "deceased brother Edmond Malone, in whom I place the utmost confidence, his heirs and assigns, for ever, not entertaining the least doubt "but that he will in due time and upon the first proper occasion take "care not only to have the said estates so devised to him by me, but my "paternal estate, settled in such manner that the said estates may "continue in the male line of our family, and in our name and blood, "and to go to the several branches of it in succession, one after another, "according to their priority of birth and seniority of age, the elder and "his issue male being always preferred to the younger and his issue male, "according to the usual course of family settlements, as by the rules of "law the same may be properly done. And I do hereby most earnestly "recommend it to my said nephew to see the same so settled, still, "however, reserving to himself, and limiting to all the male branches of "our family to whom estates only for life shall be limited, in remainder "or succession, all such proper and reasonable powers as are usually

* The statement of the facts of the above case, which has been considered necessary as an introduction to the judgment of the Lord Chancellor, has been taken from the printed case and appendix. The judgment is taken from the notes of the short-hand writer (Mr. Gurney), for which the Editor is indebted to the kindness of Murdock Greene, Esq., Solicitor for John Malone, the respondent.

“given and attendant upon such limited estates, in order to enable him
“and them, as they shall be respectively seized in possession, to settle
“jointures upon their wives or such women as they shall happen to
“marry, and to provide for their younger children, or for their daughters,
“if they shall happen to have daughters only and no issue male, and to

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"make leases for reasonable limited terms when they shall be respectively seized and in actual possession, by virtue of any remainder that shall be so limited to them respectively, and all such other reasonable powers as my said nephew may think fit, necessary, or expedient to add, in order to guard against the consequences of unforeseen accidents or events. And I do hereby appoint my said nephew Richard Malone sole executor of this my will, and request he will take upon him the execution thereof, and the performance of the trusts thereby reposed in him."

The testator died in 1776, leaving the following persons of the male line of his family him surviving:—Richard Malone (afterwards Lord Sunderlin) and Edmond Malone, the sons of his eldest brother Edmond (then deceased), Henry Malone, Richard Malone, and Anthony, the sons of Richard Malone, his younger brother, and the only son of Henry Malone, who was also called Richard.*

Lord Sunderlin entered into possession of the estates devised by the testator; and in 1777 and 1781 he suffered two recoveries of the estates which the testator had derived from his father, and died in 1816 intestate and without issue, leaving his two sisters Henrietta and Catherine Malone, his co-heiresses at law, him surviving.

No settlement had ever been executed by Lord Sunderlin, as directed by the testator, and his sisters entered into possession of all the estates upon his decease.

Edmond Malone, the brother of Lord Sunderlin, died in his lifetime without issue; and Henry Malone, the eldest son of testator's younger brother Richard, died in 1814, leaving Richard Malone, his eldest son, who was born at the death of the testator, him surviving. Richard Malone, the son of Henry, having therefore, upon the decease of Lord Sunderlin, become the eldest of the male line of the testator's family, filed a bill, in December 1816, against Henrietta and Catherine Malone, claiming the benefit of the trusts in the testator's will, and alleging that he was entitled to an estate for life in both the acquired and paternal estates of the testator under the will, and praying that the estates might be settled according to the directions contained in the will.

Henrietta and Catherine Malone, by their answer, insisted that Lord Sunderlin was bound by no trust, in respect either of the acquired or of the paternal estates of the testator; that he took the former as the testator's heir-at-law; and that by the recoveries which he suffered, he had acquired the fee of the latter, and that they were entitled to both as his heiresses and heiresses of the testator.

Issue was joined in that cause, and witnesses examined; but before it was heard, a compromise was come to, by which Henrietta and Catherine agreed to convey the entire of the estates to Richard Malone absolutely, upon his securing them a provision for their lives: and by a deed

* See the Pedigree in preceding page.

of the 1st of June 1820, reciting the agreement between the parties, Henrietta and Catherine Malone conveyed both the paternal and acquired estates of the testator to trustees, upon trust, to secure them an annuity of £3000 for their lives and the life of the survivor, and subject thereto, to the use of Richard Malone for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Richard, in tail male, and in default of such issue, remainder to Richard, his heirs and assigns.

Richard Malone entered into possession of all the estates, and having no issue, he, by his will bearing date the 16th April 1830, devised the paternal and acquired estates of the testator (Anthony Malone) to Henry O'Connor and Alicia O'Connor his wife, Hugh Morgan Tuite and Thomas Ardill, and their heirs, upon trust, for payment of his and his father's debts and certain legacies and annuities given by his will, and subject thereto, upon trust, for his sister Alicia O'Connor and her husband Henry O'Connor, for their lives, and the life of the survivor of them, with remainder to the use of Edmond Malone, therein described as the first son of the late Edmond Malone, of Ballinahoun, for life, remainder to his first and other sons in tail male, with remainder to John Malone, second son of the said Edmond Malone of Ballinahoun for life, with remainder to his first and every other sons in tail male, with remainder to Edmond L'Estrange, therein named, for life, remainder to his first and every other son in tail, with remainder to George L'Estrange, therein named, for life, with remainder to George L'Estrange, son of the said George, for life, with remainder to his first and every other son in tail male, with remainder to all and every the other sons of George L'Estrange, in tail male, with the ultimate reversion to the right heirs of the testator in fee.

Richard Malone died in 1834, without issue, leaving his sister Alicia O'Connor and another sister, Catherine Whitstone, his co-heiresses at law, and also co-heiresses of the testator Anthony Malone, him surviving.

In August 1836, the respondent, John Malone of Coburg Place, filed his bill against the trustees and all others interested under the will of Richard Malone, claiming the benefit of the trusts of the will of Anthony Malone, and alleging that he was the eldest son and heir of Richard Malone, the second brother of Henry, and as such entitled in possession to an estate in tail male in the paternal and acquired estates of Anthony Malone.

In the charging part of the bill, it was stated that the defendants alleged that the plaintiff was not legitimate, because, although a marriage was solemnised between his father and mother in the month of January 1801, which was before the birth of plaintiff, yet that such marriage was invalid, because it had been solemnised by a Roman Catholic Priest, and Richard Malone, plaintiff's father, was a Protestant. In rebuttal of those pretences, plaintiff charged, that although his father had been educated and brought up as a Protestant, yet that several years before his

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marriage with plaintiff's mother (who was a Roman Catholic), he became and was at the time of the marriage a Roman Catholic; and plaintiff charged that the marriage was solemnised in or about the month of January 1801, in the chapel of Townsend-street, in the city of Dublin.

The cause came on to be heard upon the 13th November 1837, when an issue was directed "to try and inquire whether the plaintiff, "John Malone of Coburg Place, is the heir-at-law of Richard Malone "deceased, who was the son of Richard Malone, one of the brothers of "the Right Honorable Anthony Malone, the testator in the pleadings "named, or not. The plaintiff to be plaintiff in the issue, and the "defendants, A. O'Connor, H. M. Tuite, and Thomas Ardill, to be "defendants therein."

The entry of the marriage in the book of the Roman Catholic Chapel was dated the 22nd of January 1801, and the mother of the plaintiff, in her depositions, stated that the marriage was solemnised in January 1801; and in detailing the dates of the births of her children, she stated that her son Anthony (who was still alive) was born in Preston in Lancashire in 1801, and the plaintiff John in Wexford in 1805. In subsequent parts of her depositions, however, she stated that the plaintiff was the eldest son born after her marriage with Richard Malone in Townsend-street Chapel. The only surviving witness to the marriage, in her depositions, also assigned the same date (January 1801) to the marriage.

The issue was tried in December 1837, before a special jury of the county of Dublin, when a marriage was proved to have taken place in January 1802, and a verdict was found for the plaintiff. An application for a new trial was made in January 1838 by the defendants to the Lord Chancellor, who granted the same upon certain terms. The defendants being dissatisfied with the terms upon which the new trial had been granted, appealed to the House of Lords, who varied the order in several particulars complained of by the appellants.

At the time the issue was originally directed, the defendant John Malone was a minor; and pending the appeal against the order granting the new trial, he attained his age, and applied for liberty to put in a new answer and make a new defence, which was accordingly granted; and on the 30th November 1838, the cause was heard against him upon pleadings and proofs, when his Counsel contended that the bill should be dismissed against him, in consequence of the plaintiff having not only not proved by the depositions in the Equity cause, that he was the heir-at-law of his father, but having actually proved that he was not, and that another was. The Lord Chancellor refused to dismiss the bill, and pronounced the following order:—

"This cause being set down by the plaintiff to be heard against the "defendant John Malone, late a minor, and Counsel for the said defend- "ant John Malone having insisted that upon the pleadings and proofs in "this cause, the plaintiff bill should be dismissed; the Court is pleased to

"declare that the same ought not to be so dismissed; and the Court declining to enter into the consideration of the question of the construction of the will of the Right Honorable Anthony Malone, in the pleadings mentioned, until the right of the plaintiff to raise that question shall have been first determined: It is ordered that this cause do stand over, to be heard for further directions against the said defendant John Malone, at the same time as the same shall be heard against the several other defendants."

Upon the 9th November 1839, the cause was set down upon the Lords' order, and a new trial was directed in conformity with the order of their Lordships, upon the appeal; at which all the defendants were to be at liberty to appear by Counsel as they might be advised. At that hearing, the Counsel for the defendant John Malone again contended that the bill should be dismissed, or that the Court should proceed to adjudicate upon the will of Anthony Malone, whether there was any trust to be executed under which the plaintiff could establish a title to the lands; or, thirdly, that if an issue were directed, it should not be in the terms in which it was heretofore directed, but in terms to ascertain whether the marriage alleged in the pleadings in the year 1801 ever took place or not; and whether, at the time of such alleged marriage, or within twelve months before, Richard Malone, the alleged father of the plaintiff, was or professed himself to be a Protestant. The Court not having acceded to those requisitions of his Counsel, the defendant John Malone presented a petition of appeal against the order directing the issue originally, the order of the 5th December 1838, wherein the Court refused to dismiss the plaintiff's bill, and the order of the 15th November 1839, directing the new issue.

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The LORD CHANCELLOR this day delivered the following judgment:—

June 7.

My Lords, this case involves several points of very considerable importance in the practice of Courts of Equity, on some of which it will be necessary for your Lordships to come to some decision; and others of which, although they have been discussed at the Bar, do not, in the view that I take of this case, call for any opinion of your Lordships.

My Lords, the contest between the parties arises upon a will of Anthony Malone, who by his will, left his property to his nephew, with a recommendation that he should continue that property in the male line of the family. He, however, assumed that this recommendation from the testator did not bind him to settle the property so as to continue it in the male line of the family, but conceived that the will gave him an absolute dominion over it; and he accordingly, or those who claimed through him, settled the property upon the present appellant, as tenant for life, with

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remainder to his first and other sons in tail, expectant upon the prior estate for life. The present plaintiff alleges that he is the heir male—that is, the male representative of that Anthony Malone; and contending that the recommendation in the will of Anthony Malone was obligatory upon Richard Lord Sunderlin, who took under that will, he insists that he is entitled to have the property so settled as that he, John Malone, should be entitled to that property as tenant in tail in possession.

My Lords, in stating this, he states the mode in which he derives his relationship to that Anthony Malone, who made the will. He states that he is the son of Richard Malone, which Richard Malone was the son of Richard, which Richard was one of the brothers of Anthony Malone, the testator; and according to the statement of it, if these facts were verified and established, no doubt the plaintiff would fill the character which he assumes, of heir male of Anthony.

My Lords, it is obvious that a suit so constituted embraces two points; one of fact, and the other of law. It is necessary for the plaintiff claiming as heir male of Anthony Malone, to make out that he does in fact fill that character, and on his establishing that fact, then a question of law arises, whether the will of Anthony Malone imposed a duty on Lord Sunderlin, who took immediately under the will, so to settle the estate as to make it descendible in the male line of the family of Malone.*

My Lords, in cases of this kind, where the party assumes a character which he must establish before he can raise the point of law, it is contended on the part of the present appellant, that it is the duty of the Court to decide the point of law in the first instance, because, if the point of law be against the plaintiff, then it is immaterial whether he fills the character he assumes or not; and for this purpose the case of *Gordon v. Gordon (a)*, was principally relied upon. Other cases were cited, particularly the case *Lynn v. Beaver (b)*, which, when looked at, proved to be no authority for that proposition; and if the facts of that case were at all similar to the present, it will be found that the question of practice was not the same, because, if the plaintiff in that suit had been one of the next of kin, and the sole question had been, whether there was not other next of kin, the question would not have been whether the plaintiff filled a situation entitling him to ask for the decision of the Court, but whether there were not other persons equally filling that situation, who ought to be before the Court before the question was decided.

It appears, however, upon reference to the decision in *Lynn v. Beaver*, that it was decided by the consent and concurrence of all parties; and it

(a) 3 Swans. 400.

(b) Turn. & Russ. 63.

* See upon this subject the case of *Knight v. Knight*, 3 Beav. 148.

is quite clear that it must have been so. It was suggested at the Bar, that that might be an error in the report, but it is clear that it was not an error, because it appears, that the Master upon a reference to him by the Vice Chancellor Sir John Leach, found that the plaintiff was not next of kin. The question was, whether a person of the name of Foster was next of kin, and it came before Lord Eldon, on exceptions to the report. Now, upon the exceptions to the report, Lord Eldon had nothing to decide, but whether the Master had come to a right conclusion. It was impossible that Lord Eldon should have come to the decision to which he came, unless he had the consent and concurrence of all parties. That case, therefore, is no authority to the present purpose.

Other cases have occurred within my own experience, which, however, were not cited at the Bar, but on which very different questions have been raised, and in which Sir John Leach had adopted a practice which Lord Eldon did not entirely approve of. When cases of this sort, of persons claiming as next of kin, came before the Court, Sir John Leach was in the habit of saying, "I will not decide this question, until I have all the parties before the Court who represent the next of kin, they may be numerous, or they may be few;" and it was his habit to refer to the Master, in the first instance, to ascertain who was the next of kin. Lord Eldon thought that occasioned very considerable expense, which possibly at last might be useless, and therefore finding that he had a next of kin before the Court who was entitled to fill that character (whether jointly with others or not), he thought it better to decide the question of law between the parties, than first put them to the expense of deciding who were the next of kin, which might become useless. But in all these cases, there was a person filling the character which he assumed.

The case of *Gordon v. Gordon* is entitled to the highest consideration, because it is a case which Lord Eldon decided; and Lord Eldon's observations, as reported, would imply that he doubted at least whether it might not have been better to have decided upon the other parts of this case before the expenses were incurred of an issue, as to whether the plaintiff was heir-at-law, or not. My Lords, I cannot but feel very considerable doubt whether these expressions did fall from Lord Eldon without some qualification, which is not to be found in the report; because, when the facts of that case are considered (and I very well remember the case at the Bar), it is clear that the Court could not deal with the question without knowing who was heir-at-law.

That was a contest between two brothers for the family estates. It related to the legitimacy of the elder one; the younger brother claiming because he alleged the elder brother was illegitimate. In that contest the parties came to an arrangement between themselves, by which they agreed upon a certain division of the property. It afterwards appeared

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that the younger brother, at the time he got his elder brother to enter into this compromise upon the supposed doubt, whether the marriage had taken place anterior to the birth of the eldest son, was in possession of evidence of a marriage; and that he therefore had induced his brother to part with this property to which the elder brother was clearly entitled, upon the supposition of there being a doubt as to the marriage, when, in point of fact, he was in possession of evidence to prove it. The elder brother discovering this, filed his bill to be released from that arrangement, upon the ground that the younger brother had practised a fraud upon him, and ultimately succeeded. But how could that question have been decided between the parties without the fact being known whether the elder brother was legitimate or illegitimate?—The whole foundation of the charge was that his younger brother knew it, and concealed the fact from him when he got him to come into the arrangement. It is impossible, therefore, that Lord Eldon could have meant this, that the Court should have decided whether the arrangement was fraudulent or not, without first ascertaining the fact upon which the existence of the alleged fraud depended.

My Lords, if these authorities do not lead to a conclusion favourable to the party appealing in this case, there is no authority in his favour. In my experience I have never known a case take the turn which it is alleged this case ought to take. A party comes assuming a certain character, and founded upon that character assumes a certain right to the decision of the Court, with respect to the property in question. If he has not first established the character he assumes, how can the Court deal with the consequential inference, without knowing whether he is the party that he assumes to be?

Then another observation which arises is, that generally speaking, it would lead to very evil consequences if this Court were to adopt that course of practice, and to enable a plaintiff to obtain the decision of the Court on the point of law without putting him to the proof. If the defendants had demurred to the bill for the purpose of raising the question of law, the fact of the plaintiff being heir male would have been admitted. Any one of the defendants had the power, if they had thought fit to adopt that course, by demurrer to have admitted, for the purpose of argument, that the plaintiff was what he claimed to be, heir-at-law—but adding, “we demur because we allege that even assuming the fact to be so, the plaintiff has no right;” and not allow him to proceed with his case before the Court bound to prove, if he can, by evidence before a jury, that he does maintain the character which on the pleadings he has assumed, and on the assumption of which alone he claims to be entitled to the equity which he asks the Court to decree in his favour.

My Lords, supposing this were merely a matter of discretion (which I

admit it may be considered to be) and that there is no positive rule upon the subject (and I can easily conceive a case occurring in which it would be left to the discretion of the Court, either to dismiss the plaintiff's bill upon the facts as they appeared, or to declare that even assuming the plaintiff to be what he asserted himself to be, still he would have no equity); then the question is, what is right to be done in this case, assuming that there is a discretion in the Court, either to decide the point of law first, or to put the plaintiff to prove his title first.

That question is raised as to the first order pronounced in this case in the year 1837, by which the Court directed an issue to be tried, whether the plaintiff was the heir male of his father. Now, the form of that has given rise to some singular objections at the Bar. At that time, the present appellant, who was then the defendant, was a minor; the property which had descended to those claiming through Lord Sunderlin, had become vested in three trustees; and under that trust the present appellant, the defendant, was entitled to the estate as tenant for life in remainder. The order for the issue is drawn up by consent, and that order is the first appealed from.

Now, a case has been referred to for the purpose of shewing, that though an infant is not competent to give consent, that is to say, that it is the duty of those who represent the infant to abstain from consenting, he not being of age to bind himself, or by his own act to dispose of property which may belong to him; yet, that if an infant does consent, he is bound by that consent. My Lords, it does not appear to me at all necessary to enter further into that question; because, if your Lordships shall be of opinion that the order made in 1837, was a right order to be made, if that consent had not been given, it is quite immaterial to consider whether the infant ought or ought not to be bound by that consent. But there is another reason which makes it immaterial to consider how far that consent was binding upon the infant—which is this, that the Court has thought proper in a subsequent stage of the cause, to relieve the infant from the consequences of that consent, and to permit him to put in a new answer, and to go into new evidence; and the Court has ultimately come to a decision, which is the principal subject-matter of this appeal, not upon the order for the issue in 1837, but upon the order of 1839, when this appellant had attained his majority, when he had been permitted by the Court to put in a new answer, and to enter into a new defence; and when he was in a situation to ask the Court to come to such an adjudication upon the cause as the Court might think just, without reference to the former proceedings. It appears, therefore, immaterial for your Lordships to consider the order of 1837, except so far as that order having existed, and the trials having taken place under it, might operate upon the discretion of the Court, if the Court had a discretion

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to exercise, in considering what course it ought to adopt, when the cause ultimately came before it in 1839.

My Lords, I should here observe upon a part of the case which was very much pressed at the Bar, that the bill ought to have been dismissed on this ground, that the plaintiff having alleged himself to be the legitimate son and heir of his father Richard, had disproved his own heirship, and had actually proved that he was not the heir; and, upon the depositions as printed for the appellant, no doubt that would be the result of the evidence of Bridget the mother. But those are only partial extracts from the depositions, which ought not to be looked at without looking at other parts of the same depositions; and when the depositions of Bridget are looked at, although there is evidently an inaccuracy in one part of her depositions or in the other, it is perfectly plain that she never meant to depose to any facts which constituted proof that John was not the heir. For Bridget says, that having contracted a marriage, and there being a doubt whether the marriage was valid, a second marriage took place in January 1801;—and in another part of her deposition she states the elder brother, Anthony, was born in July 1801, which, of course, would have made him the eldest child of that marriage. But in another part of the depositions she says in so many words, that the present plaintiff in the suit was the first child born after the marriage in 1801; and she says that the other, Anthony, who would have been the elder brother born in July 1801, was the child born last preceding the marriage, therefore, there was clearly some misapprehension either as to date or as to some other circumstances. But it is clear that taking the whole of these depositions together, she states and proves, supposing what she states to be true, that the plaintiff was born the first child after the marriage, and consequently, therefore, would be the eldest son and heir of Richard. It is clear to me, therefore, that upon such evidence it would have been quite out of the question for the Court of Chancery in Ireland to have dismissed the bill. There may have been ground for doubt arising from ambiguity or mistake in the evidence, but it certainly was a case which required further investigation before it could be dismissed.

Then, my Lords, the cause proceeded:—the issue was tried, and that took place which has been the subject of discussion at your Lordships' Bar—that at the trial, instead of adhering to the marriage, as it had been represented to have taken place, other evidence was given which took the other party by surprise, and which was thought a sufficient ground to direct a new trial of that issue.—All this time the defendant remained a minor, but he attained his majority in March 1838, and then he applied for leave to put in a new answer and to enter into a new defence, and leave was given.

Now that leave having been given, and that course having been adopted,

and that not being a subject of complaint at your Lordships' Bar, I abstain from entering into that part of the case further than to observe, that if the question should arise how far a party who was an infant during the time when a decree was pronounced, afterwards attaining twenty-one, is entitled to be let into a new defence in a case like this; if that question should arise, it is one which, I think, will require serious consideration. There is very great obscurity and a great deal of contradiction in the authorities upon that subject, and it is a proper subject for very serious consideration whenever the question may arise. In this case it was done, and it has not been complained of, and therefore, your Lordships can come to no decision upon that point.

That, however, put the plaintiff in this situation, that an order has been made for an issue, and although proceedings have taken place under that order, no issue has in fact been tried coming to any conclusion as to the character of the plaintiff in this suit. After the defendant had attained twenty-one he applied to put in a new answer, claiming an interest in this property in common with others against the claim of the plaintiff. The whole case must depend on the plaintiff's proof of the fact, and the conclusion to be come to upon the law; because if he succeed in both, of course all those who claim under Richard Malone will lose their estate. They all stand on Richard Malone's title, and their rights depend upon whether he had or had not a right to dispose of the property. If he had not, and the plaintiff is the heir male, he is already entitled. I am not assuming that that will be the result of this cause, but I am only stating what is the situation of the parties.

The Court, as I have stated, allowed this defendant to put in a new answer, he made a new defence, and the cause came on before the Court of Chancery in Ireland upon an order of this House, varying in some respects the direction for the new trial which the Court of Chancery in Ireland had made; at the same time it came on, on a new case made by this appellant. I pass over the intermediate order which is the subject of appeal, namely, the order of a prior date, 5th December 1838, in which the Court merely directed the cause to stand over, a subject-matter of appeal, which your Lordships would not be very much disposed to encourage, particularly when in the course of events it was perfectly impossible that that appeal should be heard, until after the time was expired to which the cause was postponed. I come at once to the last order, the order of November 1839, in which the appellant, relieved from the consequence of the order of 1837, proceeded to make a new defence and to examine witnesses of his own, and came before the Court of Chancery as upon an original hearing. The cause, however, came on, as far as the other parties were concerned, upon the order of this House directing the Court of Chancery in Ireland to make certain alterations in the order which had been made by that Court.

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My Lords, the appellant says that he considers himself as much entitled as he would have been upon the original hearing, to have the decision of the Court upon the construction of the will, before any investigation was directed as to the title which the plaintiff claimed in his character of heir male.

Now, my Lords, if I am right in assuming that it is a question for the discretion of the Court, whether the Court will decide in the first instance upon the construction of the will, or will take the course of sending question of the fact to an issue, I will beg your Lordships to consider what was the subject-matter then submitted to the discretion of the Court. It was then a matter of more doubt than it would have been supposed to be in the outset, whether the plaintiff did or did not sustain the character he assumed. He had obtained a verdict, but upon application to the Court, a new trial had been directed, and the order directing a new trial had been affirmed by this House. Here there was a question involving the interests of various defendants, some tenants for life, others tenants in remainder, and other persons interested under the title derived from Richard Malone, all of whom had, by the order of 1837, bound themselves to the propriety of the issue trying the plaintiff's title, and who, therefore, could not then dispute it. That order of 1837, at least as to them, was binding. They had gone through various proceedings questioning the result of that trial, and they were all parties to the order of this House, at least the defendants in this action were parties to the order of this House, directing that the new trial should proceed with certain modifications, which were introduced into the order. It appears, therefore, that the plaintiff was claiming against various defendants, all of whom, with the exception of the present appellant, had consented, and were bound to take the course of having the plaintiff's title in the first instance decided.

Now if, as I conceive, it would be right in ordinary cases (I am not at all stating that a case may not arise in which the Court might be justified in taking the contrary course), but if, in ordinary cases, the Court would be right in calling upon the plaintiff to establish the character in which he is suing, how much more so must it be in the exercise of the discretion of the Court, when all but one have concurred in that mode of investigating the question between the parties? Now, what would have been the result if a different course had been followed? Supposing the Court had attended to the application of the appellants, and had said, *quoad* the present appellant, we will look at the will, and see whether the plaintiff is entitled to a decree upon that will, assuming that he is what he represents himself to be, if the Court had come to a decision against the plaintiff, the present bill would have been dismissed, *quoad* the present appellant, but the bill would not have been dismissed against

the other defendants. The trial must have gone on if the plaintiff had chosen, and the plaintiff might have got a verdict establishing his title as eldest legitimate son of Richard his father ; and having obtained that, he would have a right to ask the Court to decide again upon the construction of the will. The equity of that Court might or might not have been administered by the same individual, but whether that was so or not, a contrary conclusion might have been come to ; and if it had been against the plaintiff, he might have come to your Lordships' Bar to have that question decided whether that construction of the will was right or not ; and if your Lordships' House had been of opinion that the Court below had come to an erroneous conclusion in dismissing the plaintiff's bill, the plaintiff would succeed, but succeed against whom ? against all but the most important party represented at your Lordships' Bar, because if the bill had been dismissed as against all but the present appellant, the present appellant would be no longer a party to the proceedings. That is a position in which your Lordship would have had reason to regret if the cause had come to your Lordships' Bar for adjudication. If the Court was entitled to consider the expediency of the one course or the other, it does not appear to me that, under the circumstances, there could have been a doubt as to the proper exercise of the discretion of the Court, in proceeding in the course in which it has proceeded for some years, namely, ascertaining first the accuracy of the representation of the plaintiff as to the character which he assumed.

My Lords, therefore, as to the substance of the order of 1839, I have no hesitation in stating to your Lordships that, in my opinion, that order was correct ; some objections however have been made as to the form of the order which, however, I apprehend to be equally untenable with those to which I have adverted. One objection is, that the form in which the question of right was directed to be tried, was not the form in which a matter of that sort could be investigated. The plaintiff claims as heir male. The issue is, whether he be or be not heir male. He endeavours to make out that fact by shewing that he is the eldest son after the marriage. No doubt, that, if established, would constitute his title. But, then, it is said that this may let in a title which has accrued subsequently to the institution of the suit. The issue was directed to try the real point, being the character of the heir male ; the issue, therefore, being directed to try that question, the rest are merely the means by which the character so stated may be established.

Then, my Lords, it is said that the issue is not to try whether he is heir male, but to try whether he is heir ; and it is said that is wrong, because it ought to have been to try whether he is heir male—that is to say, that the party claiming is heir male, namely, as eldest son of his father. It is too vague and too ambiguous to try whether he is heir, but that it ought to have been whether he is heir male, whether he is the

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eldest son. The result of the investigation under the issue as directed, I apprehend, would be quite satisfactory as to whether he was heir male or not; but that is seriously put forward as one of the grounds of objection.

Another ground of more importance, no doubt, but which is equally untenable, regard being had to the practice of Courts of Equity upon this subject, is that the issue which has been tried is an issue which binds the appellant; but to which he is not, strictly speaking, a party. My Lords, that is the ordinary course in which issues are directed by a Court of Equity to be tried; and of necessity it is so, because questions arise which affect the rights of a great variety of parties, who may be all interested in the question of the construction of the will; but because an issue is directed, all the parties cannot be defendants: who, then, is to conduct the defence? Cases have occurred—and some in which I have myself directed issues—where persons were interested in the same estate, and interested in the same question; and where there appeared no means of selecting between the one and the other, which should be the party to conduct the defence; and I remember one case perfectly, of very great importance, in which it was so equally balanced between the two, that I thought it right to give them an equal chance; and, therefore, I made them both parties to the issue, and put it to them to choose amongst themselves who should be entrusted with the defence. But it frequently happens in a case of that sort, that a great number of persons are interested—there may be twenty or thirty persons interested in the result of the proceedings—are they all to be defendants, and all to have an equal title to conduct the defence? That would be so inconvenient and impracticable, that it is not the course of the Court; the Court selects those persons whom it thinks most proper to be selected for that purpose; and if the case requires it, permits the other parties to attend to see that the case is properly conducted, and that justice is done. Here the Court very properly selected those individuals who represented all the interests of those claiming under the will of Richard Malone. It selected the trustees whom the deviser, the owner of the estates had selected, to conduct the defence; and the order of 1839 gave to the present appellant, together with others, a right to attend the trial, to see whether his trustees properly conducted his defence.

My Lords, that being the course of the proceeding, and that being the form of this issue, that disposes of several other minor points which were urged. The parties to the action at law, are of course the plaintiff claiming against all the trustees, and the trustees representing all claiming under an adverse title. If so, the evidence is to be regulated in the same way. There is no objection to the evidence of the persons who have been examined, and who may have died since the former

issue, and prior to the trial of the issue now directed, being laid before the jury by the best means the Court has of knowing what is said, namely, by the notes of the Judge being read to the jury. Courts of Equity are in the habit, for the purpose of saving expense, of giving directions as to the mode of trial, which might not be correct unless such directions were given; for instance, in directing proceedings, to be laid before a jury, it dispenses with the formal proofs of facts established before a Court of Equity. It saves the party the expense of going through that formal proof, and directs certain evidence to be received before the jury.

Then there are other objections, also founded upon this, namely, that the present appellant, the defendant, is affected by evidence which might or might not have been false; but when your Lordships consider that the point which has been tried is the same point, and between the same parties, in which the Court came to this conclusion on the original hearing. I have no hesitation in saying, I think the Court came to a right conclusion; and that if the hearing of 1839 had been the first hearing, and no order had been made in 1837, and no order in 1838, and no intermediate trial, it would have been equally right so to do. So much difficulty has arisen in ascertaining the truth, that, in my opinion, it was the right course for the Court to pursue, to proceed by means of an issue to establish the fact in the first instance, so as to enable the Court then to act upon the fact when found. All these objections having failed, I submit to your Lordships the proper course for the House will be, to dismiss the appeal with costs.

Orders affirmed, and appeal dismissed with costs.

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DOCKRILL, *Petitioner,*
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The lessee of See lands, held under a lease with a *toties quoties* covenant for renewal, demised part thereof as building ground for a similar term; and the sub-tenant covenanted not to carry on certain trades upon, or to throw dirt into the avenue in front of the demised premises, during the term; and that in case he, his executors administrators or assigns did so, he and they would pay an increased rent as a penalty:—*Held*, upon a petition by the sub-tenant against his landlord for a conveyance of a perpetual estate in the lands pursuant to the 6 & 7 W. 4, c. 99, that the conveyance of the fee should contain covenants on behalf of the sub-tenant, his heirs and assigns, with the lessee, his heirs and assigns, similar to those in that behalf contained in the *toties quoties* lease to the sub-tenant; although neither the conveyance of the fee, nor the lease to the subtenant, contained such covenants.

By indenture of lease, dated the 9th of December 1815, made between the Rev. Richard Graves, Dean of Ardagh, of the one part, and Terence Dolan of the other part, the Rev. Richard Graves demised to Terence Dolan two fields and an old lime-kiln and lime-kiln lot, being part of the farm of St. Sepulchre, situate in the parish of St. Kevin and county of Dublin, containing 3A. 3R. 37P. or thereabouts; saving and excepting thereout unto the Archbishop of Dublin and his successors all mines, minerals, timber trees and other royalties, with liberty of ingress, egress, and regress to him and them to dig, raise and carry away the same; and also saving unto the Company of Undertakers of the Grand Canal all such parts of said premises (if any) as were then in their possession; and saving unto the said Archbishop and his successors liberty of hunting, &c., and of entering upon the demised premises to see the state and condition thereof, as fully to all intents and purposes as in the original lease from the Archbishop was saved, excepted and reserved; to hold the demised premises, saving and subject as aforesaid, unto Terence Dolan, his executors administrators and assigns, for the term of twenty years, to be computed from the 25th day of December then last past, at the yearly rent of £109. This lease contained the usual powers of distress and entry; and a covenant by the lessor, that he, his executors administrators and assigns would at all times thereafter use his and their best endeavours to renew the lease under which he held the demised premises, with the Archbishop of Dublin and his successors; and would at all times thereafter, as often as he should obtain a renewal thereof, execute to Terence Dolan, his executors, &c., a renewal or new lease of the demised premises for the same term as he himself should obtain, excepting the last twelve months thereof, subject to the same rent and covenants, upon payment of a certain fine therein mentioned; and it was further provided, that if any clauses or covenants other than are hereinbefore mentioned, should by any such renewal be put upon the Rev. Richard Graves, his executors, &c., then the lessee Terence Dolan, his executors, &c., should be liable and subject to the same covenants and clauses.

The ground demised by this lease, now called Mount Pleasant, was

laid out into terraces by the lessee, and was sub-divided by him into several lots for building; according to a specified plan. Upon some of these lots, Terence Dolan erected dwelling-houses; other lots he demised to various persons for building; and amongst others, by lease of the 7th of April 1825, he demised to Thomas Dockrill, the petitioner in this matter, a plot of ground situate at the west side of Mount Pleasant, and known by the name of Mount Pleasant Terrace, being part of the farm of St. Sepulchre, situate in the parish of St. Kevin and county of Dublin, bounded in front on the east by an avenue in front of the said Terrace; on the west, in the rear, by the Half-mile Lane; on the north by a new house and premises built and erected by the said Terence Dolan; and on the south by building-ground in the possession of Terence Dolan: to hold for the term of nineteen years, with a *toties quoties* covenant for renewal. This lease contained the same exceptions and reservations as were contained in the lease the 9th of December 1815; and besides the covenants usual between lessor and lessee, there were inserted in it covenants restraining the petitioner, his executors administrators and assigns, or any persons deriving under them from exercising or carrying on certain trades therein mentioned, or doing certain acts therein specified, under a penalty of £5 per week. These covenants are fully set forth in a subsequent part of this case. Three other leases of other lots were made to the petitioner, all of them containing *toties quoties* covenants for renewal, and having the same covenants inserted in them, and penal rents reserved, as before mentioned; and upon these plots of ground so demised, the petitioner built several houses.

Terence Dolan having died, all his estate and interest in the premises became vested in his son, the respondent Terence Thomas Dolan, who under the provisions of the 3 & 4 W. 4, c. 37, and the 4 & 5 W. 4, c. 90, obtained a conveyance of the fee in the lands comprised in the lease of the 9th of December 1815. This conveyance, which bore date the 1st of July 1839; omitted the exceptions and reservations contained in the lease of the 9th of December 1815, so far as they related to the Archbishop of Dublin and his successors, but retained that which related to the Company of Undertakers of the Grand Canal. It contained the same powers of distress and entry, and covenant for payment of the rent, *mutatis mutandis*, as were contained in the lease of the 9th of December 1815, and no others.

Terence Thomas Dolan having thus acquired the fee in the premises demised by the lease of 1815, the respondent Thomas Dockrill applied to him to grant him a perpetual estate in the premises demised by the four sub-leases, pursuant to the provisions of the 6 & 7 W. 4, c. 99, and offered to pay his proportion of the purchase-money paid by T. T. Dolan; and he accordingly caused four draft conveyances of the fee and inheritance in the premises demised by said leases respectively to be

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furnished to T. T. Dolan for his approval, previous to their being engrossed for execution. These drafts omitted all the exceptions and reservations, the covenants against trade, &c., and the penal rents contained in and reserved by the original leases. T. T. Dolan declined to approve of them, and stated that he would not execute conveyances of the fee of the said premises, unless the petitioner would consent to have therein inserted the savings and exceptions, the covenants against trades and business, and also the penal and other special covenants contained in the original leases. This the petitioner refused to do ; and presented the present petition under the 3rd section of the 6 & 7 W. 4, c. 99, praying that it might be referred to the Chief or Second Remembrancer to approve of fit and proper deeds to be executed to the petitioner by the respondent, conveying to the petitioner a perpetual estate and interest in the premises so originally demised to him by the lease of the 7th of April 1825, and the three other leases, with only such savings and exceptions, covenants against trades or business, special or penal covenants, if any, as were contained in the conveyance to the respondent Terence Thomas Dolan ; and that the Remembrancer might ascertain the proportion in which the petitioner should contribute to the purchase-money paid by T. T. Dolan, on his obtaining his perpetuity grant ; and also the rent to be in future paid by the petitioner ; and that upon payment of such proportion of the purchase-money to T. T. Dolan, he might be ordered to execute the conveyances to be approved of by the Remembrancer, and also to pay the costs of the petition.

The petition having come on to be heard on the 6th of February 1840, the Court pronounced the following order :—Declare the petitioner entitled to a conveyance from the respondent of the fee and inheritance of the premises demised by the leases bearing date the 7th of April 1825, &c., in the petition mentioned, on payment of such sum as shall be ascertained by the Chief or Second Remembrancer, as hereafter directed ; and refer it to the Chief or Second Remembrancer to settle proper drafts of such conveyances, having regard to the instruments executed between the parties, and to the relative rights and estates of the lessor in said leases, and to the provisions of the statutes of the 3 & 4 W. 4, c. 37, 4 & 5 W. 4, c. 90, and 6 & 7 W. 4, c. 99. And let the Chief or Second Remembrancer ascertain what sum, if any, the petitioner is to pay to the respondent as contribution towards renewal fines or otherwise, on obtaining such conveyance.

Under this order, the Second Remembrancer made his report, dated the 29th of January 1841, and thereby ascertained the sums to be paid by the respondent. He also settled four several draft conveyances of the fee to the respondent. The drafts, as settled by the Remembrancer, omitted the exceptions and reservations contained in the lease of the 9th of December 1815, so far as they related to the Archbishop of Dublin and his successors, but retained the exception relating to the Grand Canal Company.

There were also inserted in them powers of distress and entry, and a covenant on the part of the lessee, his heirs and assigns, to pay the reserved rent; and also the following covenants, which were the same as those contained in the original leases, *mutatis mutandis*. "And that he the said Thomas Dockrill, his heirs and assigns, shall and will well and sufficiently repair, uphold, sustain, amend and keep the said granted and released premises, and all edifices, houses, buildings and other improvements now erected or hereafter to be erected thereon, and the inclosures, fences, limits and boundaries thereof, in good and sufficient order, repair and condition; and at the end or other sooner determination of the term hereby granted and released, or intended so to be, shall and will so yield up the same unto the said T. T. Dolan, his heirs and assigns: AND further, that he the said Thomas Dockrill, his heirs and assigns, or any person or persons deriving by, from, or under him or them, shall not and will not, at any time during the term hereby granted and released, carry on, use or exercise, or permit or suffer to be carried on, used or exercised, in or upon the said hereby granted and released premises, or any part thereof, the trade or business of a publican, vintner, tallow-chandler, soap-boiler, glue-maker, butcher, lime-burner, distiller, brewer, chemist or any other trade or business or manufacture; and shall not and will not, at any time during the continuance of this grant or release, lay down, or permit or suffer to be laid down in the avenue in front of the said hereby granted and released premises, or in the lane at the rear thereof, any dirt, coal-ashes, or any other rubbish. And in case it shall happen that there shall be carried on in the said hereby granted and released premises, or any part thereof, any trade or business as aforesaid, or that the said Thomas Dockrill, his heirs or assigns, shall lay down, or permit or suffer to be laid down in the avenue of the said granted and released premises, or in the lane at the rear thereof, any dirt, coal-ashes, or other rubbish, that then and in either or any of such cases, the said Thomas Dockrill, his heirs and assigns, shall and will well and truly pay or cause to be paid unto the said Terence Thomas Dolan, his heirs or assigns, the further increased rent or sum of £4. 12s. 4d. for every week, and so in proportion for a lesser time than a week, that there shall be carried on in the said granted and released premises, or any part thereof, the trades or business aforesaid; or that there shall be laid down and remain, or shall be permitted and suffered to lay down and remain in the said avenue in the front of the said granted and released premises, or in the lane at the rear thereof, any dirt, coal-ashes or other rubbish."

To this report the petitioner excepted; for that the Remembrancer had in the draft deeds of conveyance, "inserted certain savings and exceptions, covenants against trades, prohibitions and penal covenants, whereas petitioner submits, that inasmuch as no such savings or covenants

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"are in the conveyance under which the respondent himself holds, they ought not to have been introduced into said draft deeds of conveyance in the report mentioned; petitioner being entitled, under the several acts of Parliament lately passed relating to the Temporalities of the Church of Ireland, to conveyances of the fee and inheritance of the premises demised by the leases in the petition and order of reference mentioned, as full, ample and unconditional, as the respondent is now entitled under his conveyance."

Mr. Warren, Q. C., Mr. W. Brooke, Q. C., and Mr. Purcell, for the petitioner.

Sergeant Greene, Mr. Smith, Q. C., and Mr. H. Martley, for the respondent.

For the *Petitioner*.—1. The conveyance of the fee ought not to reserve any penal rents. By the 129th section of the 3 & 4 W. 4, c. 37, penal rents are excluded from the consideration of the Commissioners in ascertaining the rent to be reserved on the new lease. The 4 & 5 of W. 4, c. 90, enacts to the same effect in substance though not in terms. It provides that the rent-charge thereby made payable to the mesne landlord is to be equal to the net annual income or profit-rent *for the time being*, derived by the mesne landlord from the lands; which manifestly excludes the supposition that penal rents (which are contingent) are included. The 6 & 7 W. 4, c. 99, uses the words yearly rent only, when speaking of the mode in which the rent to be reserved is to be ascertained. But as all these statutes are *in pari materia*, and to be construed as if they formed but one act (6 & 7 W. 4, c. 99, s. 37), the word rent used in the 2nd section of the 6 & 7 W. 4, c. 99, must receive the same construction as when used in the 3 & 4 W. 4, c. 37, s. 129; that is, it excludes penal rents. *Biddulph v. St. John* (a), *Earl of Ailesbury v. Pattison* (b). Now the 6 & 7 W. 4, c. 99, s. 2, enacts, that the yearly rent reserved upon the lease, together with such sum of money to be added thereto, calculated as in the act is mentioned and excluding penal rents, is to be *the future rent* to be reserved on the conveyance in fee; that is, it is to be the only rent reserved; therefore the draft settled by the Remembrancer is not in conformity with the enactments of the statute in this respect, that thereby penal rents are made payable to the mesne landlord. 2. The penal rents, and the covenants in restraint of trade and against throwing dirt into the avenue are inconsistent with a grant in fee-simple, which by the provisions of the statute, the tenant is entitled to. *Byrne v. Hugo* (c) decides that the tenant is entitled to an absolute

(a) 2 S. & Lef. 521.

(b) Doug. 27, 30.

1 Ir. Eq. Rep. 351.

unconditional estate in fee-simple.—[PENNEFATHER, B.—No; but that if the Bishop conveys the royalties to the immediate tenant, the latter must grant them to the sub-tenant, though they were excepted and reserved out of the leases to the immediate and sub-tenant.]—The Master of the Rolls says that according to the literal construction of the 6 & 7 W. 4, c. 99, the under-tenant should have from his landlord, having purchased the fee, a conveyance as ample as the landlord had from the Bishop. Here the conveyance from the Bishop does not contain any restrictive covenants or clauses. The policy of the Church Temporalities Act, in regard to this subject is, to give the estate in fee to the most remote tenant having a *toties quoties* covenant for renewal; and to reduce all the tenants intermediate between him and the See to the situation of rent-chargers. Suppose that in this case the immediate tenant of the See had not purchased the fee, but that the petitioner had obtained a conveyance of it under the 4 & 5 W. 4, c. 90, the respondent would in that event be only entitled to a rent-charge; and the conveyance to the petitioner from the Bishop would have been unincumbered by any of these restrictive covenants or conditions. Then why should an estate, clogged with conditions, be given to him, when he purchases under the 6 & 7 W. 4, c. 99?

The sections of the acts referred to on behalf of the petitioner were,—3 & 4 W. 4, c. 37, ss. 128, 129, 130, 145: 4 & 5 W. 4, c. 90, ss. 30, 90: and 6 & 7 W. 4, c. 93, ss. 2, 95. The objection that the conveyance contained the exception relative to the Undertakers of the Grand Canal, was not insisted upon.

For the *Respondent*.—The provisions in the Church Temporalities Acts, with reference to penal rents, relate merely to the ascertainment of the rent to be reserved. They are excluded from the calculation; because if included, the consequence would be, that instead of being casual and contingent, they would become permanent charges on the lands. The question still remains, whether though excluded from the calculation whereby the rent to be reserved is to be ascertained, they may not be inserted as penalties upon the breach of covenants inserted in the conveyance. The 6 & 7 W. 4, c. 99, ss. 7 & 8, and the 4 & 5 W. 4, c. 90, s. 33, shew that notwithstanding the conveyance of the fee to the sub-tenant, tenure still subsists between him and his immediate landlord, for the purposes of enabling the latter to recover the rents and *duties* reserved on the conveyance: a provision which is clearly applicable to the case of penal rents. The principal question, however, is, whether in the conveyance of the fee, covenants introduced into the original lease, not in relation to the mode of enjoyment of the thing demised, but having reference to other property of the lessor, or to the security of the rent reserved, should be inserted. It is said that they are inconsistent with the grant of an estate in fee, and therefore ought not to be inserted.

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That argument proves too much ; for a tenant in fee is not impeachable for waste, and therefore it might be said that a covenant to repair is inconsistent with an estate in fee : yet the petitioner has not objected to the insertion of such a covenant in the conveyance to him ; nor could he well do so ; for all covenants, contained in the original lease, which tend to the preservation of the premises conveyed, and to uphold the security for the rent reserved, ought to be inserted in the conveyance in fee. Again, the argument is not applicable to this case ; for the covenants sought to be inserted in the conveyance, are not inconsistent with a grant in fee. They do not detract from the disposing power of the grantee ; they only regulate the mode in which he is to use his premises in relation to the premises of his neighbours. As well might it be said that where a man is seized in fee, he cannot grant portions of his estate to different persons, and bind them by covenant to build thereon in a particular manner (a). *Byrne v. Hugo* is not applicable to this case. Here the question relates to the quality of the estate to be granted, not to the parcels to be conveyed. It never was the intention of the Legislature to alter the quality of the tenant's interest ; but merely to enlarge that interest to a fee. Under the first act, if the immediate tenant purchased the fee, the sub-tenant derived a benefit from it ; because such purchase operated at all times as a renewal of the head lease, and the landlord was at all times compellable to renew to his tenant. The sub-tenant, therefore, acquired a lease for years, absolutely renewable for ever ; but still it continued operated with the covenants and stipulations contained in the original lease : and the subsequent acts merely enlarged that leasehold estate renewable for ever into a fee ; but subject in the same manner as the leasehold estate had been.

The sections of the Church Temporalities Acts, refer red to on behalf of the respondent, were,—3 & 4 W. 4, c. 37, s. 152 : 4 & 5 W. 4, c. 90, s. 33, and the 6 & 7 W. 4, c. 99, ss. 7, 8.

The case was ordered to stand for judgment.

June 3.

BRADY, C. B.

In this case, the question comes before the Court upon an exception to a report of the Second Remembrancer, made by him pursuant to an order of this Court pronounced on the 6th of February 1840, upon a petition under the 6 & 7 W. 4, c. 99 : and the exception is for that the Remembrancer had in a draft deed of conveyance of the fee of certain lands, which it had been referred to him to settle and approve of, inserted certain savings and exceptions, covenants against trades, prohibitions and penal covenants, which were not contained in the conveyance of the fee, under which the respondent himself holds the same lands. The convey-

(a) See *Whatman v. Gibson*, 9 Sim. 196 ; *Duke of Bedford v. Trustees of the British Museum*, 3 Sug. V. & P. App. 67. 10th ed. ; 2 M. & K. 562 on Appeal.

ance of the fee, to the draft of which the exception is taken, is that to which the petitioner is entitled under the 6 & 7 W. 4, c. 99, s. 1, which gives to the under-tenants of See lands, holding by leases containing *toties quoties* covenants for renewal, the benefit of certain provisions with regard to their under leases, which the previous Church Temporalities Acts had given to the immediate tenant of the See; and the question which has arisen in this case is, whether after the parties to the original transaction,—the *toties quoties* lease,—have entered into contracts and specific arrangements with regard to the mode in which the tenant is to deal with the property demised with reference to other property of the same lessor, the tenant can insist upon getting an absolute conveyance of the fee and inheritance in the lands demised, discharged from those contracts and arrangements. This is, at the first blush, a startling proposition; it is one which would require either an express enactment or the most cogent reasoning to support. The former is wanting; and giving a fair construction of the Church Temporalities Acts, we are of opinion that they do not support the proposition of the petitioner, and that the tenant is not entitled to such a conveyance. Consider, in the first place, what was the situation of the tenant before he asked for this conveyance. The immediate tenant of the See purchased the fee under the 3 & 4 W. 4, c. 37. He thereby incurred the obligation to convert the *toties quoties* lease of his under-tenant, which previously had been contingent upon his obtaining or not obtaining a renewal of his own lease from the Archbishop, into a lease absolutely renewable for ever; for, by the 149th section of the 3 & 4 W. 4, c. 37, the immediate tenant of the See having obtained a conveyance of the fee, the sub-tenant was entitled at all times to insist upon it as a renewal of the head lease to the immediate tenant, and to require him to renew the sub-lease; which the immediate tenant was bound to do. Therefore, in the situation in which the parties stood before this application for a conveyance of the fee was made, the sub-tenant had in substance and effect an estate for as long duration in point of time, as he could acquire by a conveyance of the fee. Had he not made this application for a conveyance of the fee, he would, nevertheless, have had a perpetual estate in the lands, bound indeed by the obligations he had originally contracted; and it must have so continued. It is now, however, said, that because the 6 & 7 W. 4, c. 99, gives to the sub-tenant the power of acquiring the legal fee in the lands, instead of the perpetual renewable chattel interest which he previously possessed, that of itself necessarily discharges him from the obligation of the arrangement he had originally entered into. The question in this case has arisen upon covenants, which evidently have reference, not to any thing beneficial in the enjoyment of the property demised itself;—not to any thing which regards the mode of enjoying that property;—but they are introduced by the lessor,—the owner of a large piece of build-

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ing ground, for the benefit as well of himself, as of all the other persons to whom he might make demises of portions of that large property. In that situation of things, the tenant, upon taking his lease, contracts with his landlord to observe certain conditions beneficial to the landlord, not in reference to the property demised, but of great value with reference to the residue of his property; and the tenant (we may assume) obtains his lease at a lesser rent, by reason of his being bound by these covenants: we may assume that, I say; for he now asks the Court to release him from the observance of those covenants, as being onerous upon him. Then the question is, what is the tenant now entitled to? He had certain lands demised to him, subject to certain conditions and covenants;—what is he to get according to the act of Parliament? The 6 & 7 W. 4, c. 99, s. 1, enacts “That it shall be lawful for any inferior tenant or lessee, holding “any lands, tenements or hereditaments by virtue of any lease or contract containing a *toties quoties* covenant for renewal, and whose next “immediate landlord has or shall have acquired a perpetual estate or interest in such lands, tenements or hereditaments, to apply to such next “immediate landlord for a conveyance of a perpetual estate and interest, “*in such lands, tenements or hereditaments.*” What then is the meaning of the expression, “such lands, tenements or hereditaments?” It means the lands which the lessee held by virtue of his lease, and nothing more. Suppose the case that a right of way had been reserved to the landlord over the lands demised, how could the tenant say that he was entitled to a conveyance of the lands in fee, discharged of that right of way? There is no doubt but that clauses which are wholly repugnant to an estate in fee, are not to be introduced into the conveyance; as, for instance, a clause against alienation, or against waste, perhaps, which are repugnant to an estate in fee: but where the contract entered into is one which the grantee of an estate in fee might bind himself by;—as to observe certain stipulations for the benefit of the grantees of other parts of the same estate, I do not see any inconsistency in holding that the tenant on acquiring the fee, is to continue bound by such. Suppose that these covenants had been contained in a separate deed entered into by the petitioner, not with his landlord, but with the tenants of the adjoining houses, will it be said that by acquiring the fee, he has discharged himself from the contracts he had entered into with them? This is that very case in point of fact; for demises have been made to the tenants of the adjoining houses by this very landlord, who required this petitioner to enter into these covenants for their benefit. Can it be said that the operation of the act is, that the tenant, who has granted a right of way to his neighbour, or covenanted with him not to set up a particular trade which would injure his property,—that he is discharged from the observance of his covenant by acquiring under this act the fee-simple of the lands? It is impossible to contend that such is the case; and yet there

is no distinction between that case and the present. Suppose this were the case of an application to the Archbishop for the conveyance of the fee; and that he, being in the occupation of an adjoining lot of ground, had for the benefit of himself and his successors, restrained the tenant from doing certain acts; could it be contended that the tenant was entitled to say to his landlord, that under this statute he was discharged from all those stipulations which formed part of the original contract, and that the Archbishop was bound to convey to him an estate unfettered by such obligations? Such a proposition is so monstrous, that unless coerced, I could not assent to it: and so far from being coerced, I am of opinion that under the third section, the Court is at liberty to do justice between the parties. It enacts, that "It shall and may be lawful for the Court to hear such petition in a summary manner, *and to make such order thereon as such Court shall think fit*;" and no Court could think it fit to make such an order as that sought for in this case. These words certainly imply a sound and just discretion; not arbitrary, but one which must be regulated by what would be the consequences of the act, and what is just between the parties. If the tenant had acquired in this way the fee, and nothing was said about those rights, perhaps the landlord might have some remedy in equity, founded upon the original contract, to restrain the tenant from acting contrary to his original contract; but certainly the landlord ought not be placed in a position of difficulty, when the Court, by moulding the conveyance, may avoid it. I am, therefore, clearly of opinion, that this act of Parliament does not compel us to give the petitioner the inheritance in this plot of ground, discharged from those obligations which were introduced into the original contract by the landlord, not merely for his own benefit, but also for that of other persons.

PENNEFATHER, B.

I am of the same opinion. The object of the 6 & 7 W. 4, c. 99, was to enable the sub-tenant to acquire a fee in the lands, corresponding as to quality with the interest he had at the time of his application; and discharged from such covenants only as are peculiarly applicable to the estate of a tenant: but all other contracts and agreements respecting the manner in which the lands were to be held, remain, and were intended to remain, unaffected by the change in the estate. If the sub-tenant held the lands subject to a right of way, or to any other easement,—if he contracted to hold his lands without erecting thereon what the parties to the contract considered to be a nuisance, that is, a nuisance so far as it might interfere with the general arrangement of the property as agreed on by the parties, he must take the perpetual interest subject to the same restrictions. And it is to be considered that in this case, not only did he enter into a contract with his lessor for that purpose, but he substantially

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entered into the contract with the occupiers of the adjoining ground; and when we are called on give him the fee, we must give it to him clothed with the charges, and subject to the easements which he himself has agreed to. It never was the object of the Legislature to embrace or control the contracts of the proprietors of Church lands, with respect to the manner in which the estate was to be held, not only with reference to the lessor's own property, but also with reference to property which he might have conveyed to others. We have a right, under the express terms of the act, to direct the conveyance to be made pursuant to what is the real contract between the parties; and to give to the petitioner an estate in fee, discharged from any covenant which he has entered into, and which is peculiarly applicable to his estate as tenant, but subject to such covenants and agreements as he and his lessor had stipulated and contracted, should remain perpetual.

RICHARDS, B.

I entirely concur in the judgment of the Court.

Overrule the exception. The petitioner to pay the costs of the proceedings.

CLEARY *v.* CLEARY.

June 22.

In a suit for the administration of assets, the report, but not the bill, made a case for charging the executor with interest upon balances in his hands; *Held*, that the proper mode in which to bring the question before the Court was to present a petition stating the special matter, and praying that the cause might be set down to be heard for further directions.

THE bill was filed by the plaintiff as the personal representative of Patrick Cleary the younger, one of the four residuary legatees of Patrick Cleary the elder, against Thomas Cleary, the executor of James Cleary, who in his lifetime was the executor of Patrick Cleary the elder; and it prayed that an account might be taken of the assets of P. Cleary the elder, that the residue might be ascertained, and for payment thereof to the residuary legatees. In February 1835, the usual decree to account was pronounced; and it was also ordered that an account be taken of the assets of James Cleary which came to the hands of the defendant. Upon taking the accounts, it appeared that James Cleary had in his lifetime received assets of Patrick Cleary the elder, to the amount of several thousand pounds, which he had invested in the purchase of an estate in his own name. The plaintiff required the Remembrancer to charge the defendants with interest on the balances in the hands of James Cleary, which, however, he declined to do, as the decree did not contain a direction to that effect. The cause now came on to be heard upon report unexcepted to, and merits.

The *Solicitor-General*, for the plaintiff, was proceeding to argue that James Cleary and his assets ought to be charged with interest on the balances, when the Court inquired whether the cause had been set down to be heard for further directions?

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The *Solicitor-General*.—It has not. The Officer will not set down a cause to be heard for further directions.—[RICHARDS, B. Not without the order of the Court. The plaintiff should have presented a petition for the purpose, and then a special order that the cause be set down to be heard for further directions would have been made as a matter of course. —PENNEFATHER, B. The reason we require a petition to be presented is, that the other side may have notice of the questions intended to be raised: and the utility of such a practice is manifest from this very case, in which the defendant Thomas Cleary has not appeared upon this hearing. He may not have appeared because he is satisfied to suffer a decree upon report and merits to be pronounced against him; but he may not be satisfied with a decree charging the assets of James Cleary with interest.]—Both in this country, and in England, further directions have been given upon the hearing of the cause on report and merits; and lately, in the Court of Chancery in Ireland, an executor was charged with interest upon the hearing upon report and merits: *Franklin v. Beamish* (a).

PENNEFATHER, B.

I am sure that is not the practice of this Court. We have always held it necessary to have a petition presented for the purpose; and there is much convenience in the practice, for then both parties come prepared to argue the question.

Let this cause be struck out of the list.

(a) 2 Moll. 388.

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BARRY v. WILKINSON.

June 5.

This Court has not decided that the order appointing a receiver on a judgment attaches the arrears in the tenants' hands for the benefit of the person obtaining it.

WITH respect to this case, reported *ante*, p. 121, the following observations were made by the Court :—

PENNEFATHER, B.

Our attention has been called by his Honor the Master of the Rolls to what has been supposed to have been decided, amongst other things, in this matter. It is stated in the marginal note to the case, that "the order appointing or extending a receiver on a judgment attaches the arrears of rent then in the tenants' hands for the benefit of the person obtaining it." Now, we did not decide the proposition stated in that note, nor did we intend to decide it. The facts of the case did not call for our decision upon that point; no person appeared on behalf of the respondent claiming those rents. The facts of the case were very peculiar. There had been elegits and custodiams under which the lands had been extended long prior to the appointment of the receiver and the accrual of the arrears; so that the point did not arise before us, nor did we decide it. I mention this, in order that what we really did decide might be understood. When a receiver is appointed, we thought that convenience required, and the language of the statute authorised, that he should be the person to receive the arrears due at the time of his appointment; for otherwise, the tenants might be exposed to double distress; but saying that, we did not mean to decide that he should not receive them for the benefit of the respondent, nor did we decide it. The marginal note has, we are informed, led to a good deal of controversy in the Rolls Court; it is therefore that we desire to state that we did not decide the proposition there laid down, viz., that although upon the appointment of a receiver, he is to collect the arrears of the rents due at the time of pronouncing the conditional order, the respondent may not, nevertheless, have a claim to them.

RICHARDS, B.

In *Barry v. Wilkinson*, there had been elegits and custodiams in existence, prior to the 5 & 6 W. 4, c. 56, which affected the rents due at the time of the appointment of the receiver. It does not decide, one way or the other, the question whether the respondent is or is not entitled to the arrears due at the time of the appointment of the receiver.

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OULD v. GRIFFIN.

June 5.

Mr. J. ORPEN, for the plaintiff, moved that the proper Officer be directed to issue a *feri facias* on the decree in this cause against the goods of the defendant, pursuant to the 3 & 4 Vic. c. 105, ss. 27 & 29.

Practice as to
 issuing a *fi. fa.*
 upon a decree.

The suit was instituted for the recovery of tithe composition; and by the final decree, bearing date the 18th of November 1837, the defendant was ordered to pay the plaintiff the sum of £16. 9s. 11d., and the costs of the suit. The affidavit upon which the motion was founded stated that the costs had been taxed, and that the plaintiff had issued a subpoena and several attachments for the debt and costs, but without effect. The last attachment issued in Michaelmas Term 1840. The decree had been registered under the 28th section of the act.

Mr. *Orpen*.—In Chancery, the *feri facias* is issued by the Officer, without motion in Court: but as this is the first application here, the Officer declined issuing the writ, without the express sanction of the Court.—[PENNEFATHER, B.—The decree ascertains the precise amount of the debt; but as to the costs, there is no order ascertaining their amount and ordering the defendant to pay them. We had occasion lately to consider the section of the act on which the plaintiff relies, and came to the conclusion that there must be an order on the party directing him to pay the precise sum due for costs.]—The amount of the costs has been ascertained. They have been included in the subpoena and attachment, which may be considered as orders of the Court on the defendant to pay the sums mentioned therein; *Wallis v. Sheffield* (a).

The COURT having conferred, their opinion was announced by

PENNEFATHER, B.

We think that the proper course to be adopted in cases like the present is this: Upon an order being made for the payment of a specified sum of money and costs generally, the costs ought to be taxed; and then, upon the production of the order for the payment of the money, and a certificate of the taxation of the costs, let a side-bar rule for payment of their gross amount be entered at the Equity side of the Court; and thereupon let the Officer be at liberty to issue execution. We do not require that a further demand of the gross sum mentioned in the side-bar order should, in this instance, be made; what is requisite is, that there

(a) 7 Dow. Pr. C. 394.

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should be a precise order ascertaining the full amount of the sum to be paid; and upon the production of such an order, let the Officer issue execution. In the present case, the costs have been ascertained, and we will now order that the gross amount of the sum mentioned in the decree and of the taxed costs be paid to the plaintiff; and thereupon, let execution issue.

MARKEN v. MAGRATH.

May 13.

W. L. bequeathed to his daughter E. the sum of £500 to be laid out and disposed of for her benefit as thereafter directed; and he directed that the said sum of £500 be invested in Government stock, in trust that his executor, when convenient and eligible purchases offer, should lay out the same in the purchase of lands in Ireland, or of

rent-charges, annuities, or other beneficial estates and interests; and thereupon to settle the same to the several uses, and subject to the powers, provisions and limitations thereafter mentioned (as far as the nature of the several estates or interests to be purchased and other contingencies would admit of), that is to say, in trust well and sufficiently to settle the estates to be purchased; and to begin payment of the rents of the estates or property to be purchased for the use and benefit of his daughter as soon as she should attain the age of twenty-one years, or be married; and further, well and sufficiently to settle and secure the estates or property upon her marriage so that the same, or any part thereof, should not be liable or subject to the control or intermeddling of any husband she might intermarry with; without the same, or any part thereof, being subject or liable to the debts, forfeitures or engagements of her husband; with full power to his daughter, notwithstanding her coverture, to dispose of by her will, the estates and property to be purchased, as she should think fit.

The daughter married after attaining the age of twenty-one. No settlement was executed upon her marriage. The £500 was paid into Court by the executors in a suit instituted for the purpose.

Upon an application by the husband and wife to have the money paid out to them; *Held*, *Per Pennefather, B., and Foster, B.*—That the daughter took but an estate for life in the lands to be purchased, with power to dispose of them by will.

Per Pennefather, B., and Richards, B.—That the testator had manifested an intention that the interest given to his daughter should be settled to her sole and separate use independent of her husband, and that she should not have a power of alienation.

Per Curiam.—That the husband and wife were not entitled to be paid the £500.

"the same and every part thereof so to be purchased as aforesaid, to and
 "for and upon the several uses, intents and purposes, and under and
 "subject to the powers, provisions, limitations and agreements, hereinafter
 "mentioned (as far as the nature of the several estates or interests so to
 "purchased and settled, and other contingencies will admit of) ; that is to
 "say, in trust, well and sufficiently to settle and secure, by deed or other
 "legal instruments, the estates or property to be so purchased ; and in
 "further trust, to begin and commence payment of the annual rents,
 "issues and profits of the respective estates or property, to be so pur-
 "chased for the use and benefit of my said daughters out of their
 "respective portions as aforesaid, as soon as they shall respectively attain
 "their respective ages of twenty-one years, or upon the days on which
 "they shall be respectively married : and upon the further trust well and
 "sufficiently to settle and secure, by deed or other legal instruments,
 "their respective estates or property upon their respective marriages, so
 "that the same or any part thereof shall not be liable or subject to the
 "control or intermeddling of any husband or husbands which all or any
 "of my said daughters may, at any time, take or intermarry with ; with-
 "out the same or any part thereof being subject or liable to the debts,
 "forfeitures or engagements of their said respective husbands ; with full
 "power to each and every of my said daughters, notwithstanding their
 "coverture, to dispose of, by their their last wills and testaments, the
 "estates or property to be so purchased for their uses, as they and
 "and every of them shall think fit : And upon the further trust, that the
 "interest or produce of the said stock to be so invested as aforesaid
 "(until the same shall be so laid out in purchases as aforesaid), and the
 "rents, issues and profits of the properties or estates so directed to be
 "purchased, until my said daughters become respectively entitled thereto
 "by age or marriage, under the provisions of this my last will and testa-
 "ment, shall be paid by my said executor to my wife," for the maintain-
 "and education of his children. And the testator appointed the defendant
 Magrath sole executor of his will.

The bill was filed by the legatees and their husbands against the executor, to have it secured. The defendant brought the money into Court, and it was afterwards invested in stock.

Mr. Bennett, Q. C., and Mr. Dixon, Q. C., now moved, on behalf of the plaintiffs, that the Accountant-General do transfer to the plaintiff Mary Anne Marken and her husband one moiety of the sum of £829. 2s. 2d. stock (which was her portion of the stock in bank), and do transfer to Peter M'Donough and Alicia his wife the other moiety thereof. The motion had been mentioned in the Sittings after last Hilary Term, when the Court referred it to the Remembrancer to inquire and report who were the persons entitled to the stock in bank,

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and whether there had been any settlement executed upon the marriage of the plaintiffs respectively. The Remembrancer reported that no settlement had been executed upon the marriage of either of the plaintiffs which took place after they respectively had attained the age of twenty-one; and he set forth the will of W. Ledwidge in his report, and referred it to the Court to determine what were the rights of the parties under it. It was stated that both Mrs. Marken and Mrs. M'Donough were willing, if necessary, to waive their equity.

This is not a case in which the husband claims the wife's property, and she consents to waive her equity; but it is the case of property given to the separate use of the wife, and which she is entitled to dispose of as she pleases, during the coverture.—[PENNEFATHER, B. The first thing to be ascertained is, what estate or interest does the wife take under this will in the property bequeathed? When that is ascertained, then the question will arise, whether it is alienable; and if so, in what manner? I doubt very much that this is a gift of the absolute interest in the property to the wife for her separate use. The testator directs the money to be laid out in the purchase of lands, the rents to be paid to her for her life.]—That is not exactly the case. There is not an express estate for life limited to the daughters of the testator. The will commences with a bequest of £500 to each of the daughters absolutely, to be laid out and disposed of *for their benefit*, as thereafter directed: and then the trustee is directed to pay the rents of the purchased lands to the daughters generally, with power to them to dispose of the property by will. Under that bequest, the daughters take the absolute interest in the property; *Elton v. Sheppard* (a); *Hales v. Margerum* (b); *Ball v. Kingston* (c); *Newman v. Cartony* (d); *Pybus v. Smith* (e); *Heatly v. Thomas* (f).—[PENNEFATHER, B. In those cases, the subject-matter of the bequest was personal estate; here it is personal estate directed by the will to be laid out in land; and a gift by will of real estate to A. B. generally only gives the devisee a life estate therein.]—The daughters are the only persons interested in the lands to be purchased. The bequest is to them absolutely; and the purchase is to be made *for their benefit*. There is no limitation to their issue. They must take the same interest in the lands when purchased as they take in the money; that is the absolute interest. They may elect, as they now do, to take the money instead of the land; and they are clearly entitled to the absolute interest in the money. *Bradley v. Wescott* (g) and *Sockett v. Wray* (h), were cases in which an express estate for life was limited to the wife; and, therefore, it was held, that notwithstanding the general power of appointment by will given to her, she only took an

(a) 1 B. C. C. 532.

(c) 1 Mer. 314.

(e) 3 B. C. C. 346.

(g) 13 Ves. 445.

(b) 3 Ves. 299.

(d) 3 B. C. C. 34, n.

(f) 15 Ves. 696.

(h) 4 B. C. C. 483.

estate for life. The observations of the Master of the Rolls, in *Sockett v. Wray* must be taken with reference to the case before him, in which an express estate for life was limited to the legatee, otherwise they must be considered as overruled by Sir W. Grant in *Heatly v. Thomas*. But in *Barford v. Street* (a), the testatrix devised and bequeathed real and personal estate upon trust to pay the rents, dividends, &c., to the separate use of a married woman for life; and after her decease, to convey them according to her appointment by deed or will, with a limitation over in case of her death in the life of the testatrix, or in default of appointment; and it was held that the devisee took the absolute interest in both the real and personal estate.—[PENNEFATHER, B. A power to appoint by deed was given in that case.]

Supposing that the wife took the absolute interest in this property to her separate use, she may, nevertheless, dispose of it during her coverture. *Tullett v. Armstrong* (b) and *Scarborough v. Borman* (c), do not apply; for in them there were clauses prohibiting alienation.—[RICHARDS, B. Is there not here the manifest intention of the testator that the trustee ought so to settle the land to be purchased, that the husband should not by any means acquire a control over it, but that it should always remain as a provision for the wife? It is not necessary that the testator should have expressly directed that the settlement should contain a clause against alienation; it is sufficient if such were his manifest intention, apparent upon the face of his will. *Hovey v. Blake-man* (d).]—The intention of the testator in that respect must be expressed in clear terms; *Acton v. Smith* (e). Here the expressions used by the testator will be satisfied by holding that the wife was to take the property to her separate use, independent of her husband; which will leave her free to dispose of it as she pleases. There is no trust for the children of the daughters. The only direction is to settle the property so as to exclude the husband.—[RICHARDS, B. The direction amounts to this, to settle the property in the most effectual manner for the benefit of the daughter, so as to exclude the interference of the husband. That can only be done by inserting in the settlement a clause against alienation.—PENNEFATHER, B. The Court feels great reluctance in arguing questions without Counsel, which they are obliged to do in the present case. The trustee ought to have appeared upon this application and argued it.] For whom is he trustee? For the wife alone.—[PENNEFATHER, B. He is a trustee, if the intention of the testator be clear to that effect, for a married woman; and it is his duty to maintain the trust, even against her own wishes. There are two objections to this application: first, as to the quantity of estate which the daughters take under the will;

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(a) 16 Ves. 135.

(b) 4 M. & C. 390.

(c) 4 M. & C. 377.

(d) Cited by Sir W. Grant, M.R., in *Wagstaff v. Smith*, 9 Ves. 254.

(e) 1 S. & S. 429.

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whether it is a mere estate for life or a fee : and secondly, supposing that difficulty got over, whether the testator has not so unequivocally expressed his desire that the purchased property should remain for the maintenance of his daughters, that the Court would not be bound, in directing a settlement to be made pursuant to the trusts in the will (for it is an executory trust), to see that it be made in such a way as to carry that object into effect.]—The daughters were unmarried at the time of the death of the testator ; and, therefore, the bequest to their separate use, and the clause against alienation, if it existed, became inoperative. *Newton v. Greene* (a) ; *Massy v. Parker* (b).—[PENNEFATHER, B. These cases are overruled by *Tullett v. Armstrong* and *Scarborough v. Borman*.]

PENNEFATHER, B.

The Counsel who argued the case of *Heatley v. Thomas* (c) do not say that *Sockett v. Wray* is not law ; but they distinguish it from the case then before the Court in this manner :—that in *Sockett v. Wray* the charge was created by an act of the wife during her life time, which they argued admitted of a very different consideration from the case then before the Court, whether her debts in general should be paid out of her personal property : and the Master of the Rolls adopted that distinction. *Sockett v. Wray* appears to me to be quite untouched by *Heatley v. Thomas*, or by any thing which fell from the Counsel or the Court in that case. It does not proceed upon the distinction than in it an express estate for life was given to the wife ; and, indeed, when you come to consider a devise of real estate, that difference in expression makes no distinction in substance. A bequest of personal estate to a person generally, is an absolute gift of it ; but it is otherwise in the case of a devise of real estate : and if there be added to such a devise a power to dispose of the estate by will, that does not give to the devisee a power to dispose of it by deed. I therefore feel at liberty to apply the rule laid down in *Sockett v. Wray* to this case, for this must be considered as the case of a devise of real estate ; and the same construction must apply, whether an express or implied estate for life be given to the devisee. It is thus distinguishable from the cases of bequests of personal estate, which have been cited ; and to my mind it is more than doubtful, that the devisees in this case took more than a life estate in the lands to be purchased. In my opinion they took life estates only, with power to dispose of them by will. But even if that be doubtful, I think it is clear that the intention of the testator was, whatever may be the nature of the interest given to his daughter, that it should be effectually protected against her

(a) 4 Sim. 141.

(b) 2 M. & K. 174.

(c) 15 Ves. 569.

husband, and preserved for her use until her death ; and that her husband should not have the power of affecting it, either by its being made subject to his debts, or by her voluntary act, disposing of it in her lifetime. If a settlement were to be executed pursuant to the directions in the will, it should contain the most restrictive clauses guarding against the husband's interference with the property. The latest decisions upon this subject have upheld those restrictive clauses. If the doctrine laid down in *Massey v. Parker* were the law of the land, and those clauses ceased to have any operation upon the death of the husband, in case the legatee were married at the death of the testator, or could not at any time have had any effect, in case she were an unmarried woman at that time, then this instrument might admit of a different consideration : but the cases of *Tullett v. Armstrong* and *Scarborough v. Borman*, clearly shew that such a doctrine is not law ; and that the restriction against alienation, which is certainly inconsistent with the gift of an estate to a male, and, therefore, not allowed in such a case, will be upheld in favour of a female against her future husband, whether she be unmarried at the time, or being married, becomes afterwards discover, and marries a second husband. It appears to me very clearly, that the instrument which should be executed to carry out the intention of the testator expressed in his will, is one which would guard the property, not only from the debts and control of any husband his daughter might marry, but also from her own acts, whether prudent or not. The testator intended that this should be a provision for her, which her husband, either with or without her consent, could not touch.

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FOSTER, B.

It appears to me, that the daughters of the testator took but estates for life in the property bequeathed ; with power to dispose of it by will : and, therefore, I concur in the opinion pronounced by Pennefather, B.

RICHARDS, B.

I shall not express any opinion as to the estate or interest which the daughters of the testator took under his will ; it appearing to me that no matter what estate or interest the testator intended to give them therein, his clear intention was that it should be secured to them free from the control and intermeddling of their husbands, during their coverture. That intention appears to me to be so plain and manifest upon this will, that I consider it sufficient to rest my opinion upon that ground alone. For what is the will which we are now called upon to execute ?—for the case comes before us as if this were a bill filed to carry the trusts of the will into execution. The testator directs his executor to lay out the sums bequeathed to his daughters in the purchase of lands, and thereupon, to settle, convey and assure the same, and every part thereof, to and for

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and upon the several uses, intents and purposes, and under and subject to the powers, provisions, limitations and agreements thereafter mentioned, "as far as the nature of the several estates or interests so to be purchased and settled, and *other contingencies* will admit of:" and he then sets out the trusts which shew that the trustee was to receive the rents and pay them over to the daughters after they had attained the age of twenty-one; and that upon their respective marriages, the trustee was well and sufficiently to settle and secure the property, so that the same or any part thereof, should not be liable or subject to the control or intermeddling of any husband, which any of his daughters might at any time intermarry with, and without the same or any part of it being liable to the debts, forfeitures or engagements of such husband: with power to his daughters to dispose of the property by will. It appears from these limitations that the trustee alone was, during the coverture, to receive the rents; and the question is, whether the intention of the testator, to be gathered from his will, was merely to exclude the marital right of the husband; or to go farther, and protect his daughters from the consequences of their own acts. In my opinion, the testator had both objects in view;—that as far as contingencies would admit, he intended to secure to them the benefit of the provision made for them against their own power of alienation. On the other hand, it has been contended, that the effect of the dispositions made by the testator, was merely to exclude the marital right of the husband; and that notwithstanding them, the daughters were entitled to dispose of the property as they pleased; and to give it to their husbands, and so defeat the intention of the testator: but my opinion is, that the Court in executing the trusts of that will, would direct a clause prohibiting the alienation of the property during coverture, to be inserted in the settlement. It has been said that such a restriction is illegal; but *Tullett v. Armstrong* and *Scarborough v. Borman*, establish its legality: and *Newlands v. Paynter* (a), is a decision to the same effect, with respect to personal chattels. In that case, Lord Cottingham states what was the principle of his decisions in *Tullett v. Armstrong* and *Scarborough v. Borman*. He says, p. 417, "The principle of my decision was, "that a person marrying a woman with property so circumstanced, is "considered as adopting the property in the state in which he finds it, "and bound by equity not to disturb it. That is the only principle which "I could find upon which to support limitations to the separate use under "such circumstances." I, therefore, say, that the husband of this lady is bound by the law not to do any act to disturb the enjoyment of this property by his wife, according to the provisions of the will. Upon these grounds, without meaning to dissent from the opinions of the other members of the Court, but not desiring to give an opinion upon the other point in this case, because I would wish to consider it more fully before doing so, I agree in the judgment of the Court.

No rule.

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THE MALLOW BANK CASE.

In re DELACOUR, a *Bankrupt.*
Ex parte WILLIAM CONNELL and JOHN BURKE.

(*In Bankruptcy.*)

April 27.
May 18. a

THIS was an application made on behalf of Messrs. William Connell and John Burke, both of the city of Cork, for liberty to prove upon the estate of the bankrupt for the amount of certain bank notes which they had purchased from various parties, after the failure of Delacour's bank, and after the commission of bankrupt had been issued against him. The affidavit of William Connell stated, that in the exercise of his business as a money broker, he purchased bank notes of Delacour's bank, to a considerable amount, from various holders, who had proved the same against the estate before the Commissioners of Bankrupt in the city of Cork. Upon the 1st of July 1836, the day upon which the present Bankrupt Act came into operation, bank notes to the amount of £51. 10s. were proved by their respective holders, and were subsequently offered for sale at Mr. Connell's office, and purchased by him, being under the impression that these notes were legally proved before the Commissioners. His affidavit then stated, that he believed the holders of the notes were *bonâ fide* holders at and before the date of the Commission,—that he was unaware of the names and residence of the parties from whom he purchased them;—that he did not hold the notes in trust for the bankrupt, nor did he intend to set them off against any debt due to the estate.

Application to be at liberty to prove and receive dividends upon bank notes purchased from various holders, after the date and issuing of the commission, *refused.* No satisfactory evidence having been given to the Court of the time or place of the purchase of the notes; the price paid for them, or that the parties from whom they were purchased were *bonâ fide* holders.

The affidavit of Mr. Burke stated, that the assignees of Delacour entered into an arrangement with several of the debtors of the estate to take in payment for full value the proved and unproved bank notes of the bankrupts, in liquidation of their debts, and that he (Burke) was commissioned to purchase notes of the bank, in order to enable them to avail themselves of such arrangement. That accordingly he did purchase a large quantity of their notes, in anticipation of a demand from sundry debtors to the estate; and that not knowing the amount of their debts he over-purchased, and the assignees discontinuing to take any more notes in payment, a sum of £54. 10s. remained upon his hands, which he now sought to prove and receive dividends upon. His affidavit also stated, that he did not hold the notes in trust for the bankrupt or any debtor of the estate.

Mr. Creighton for the claimants, submitted that although this application was a departure from the rule in Bankruptcy, requiring that where a *chase* in action is assigned, both the assignor and assignee, the vendor and vendee should join in proof, it was competent for the Court, exer-

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cising its equitable jurisdiction, under certain circumstances to relax that rule. The purchasers of country notes after the bankruptcy, have been permitted to prove if they were sold to them by persons entitled to prove; *Ex parte Rogers* (a): and even though they were purchased at an undervalue, they would be entitled to prove for the full amount, *Ex parte Lee* (b). In *Ex parte Upham* (c), which was the case of a commission against bankers at Exeter; a commission in aid was ordered to be executed then, on account of the holders of small notes in the neighbourhood being numerous, and to avoid the expense of proving their small debts, in the usual way by affidavit. In that case, it appears to have been suggested by Mr. Cooke, that the notes might be brought up for the purpose of being proved under the subsisting commission, and the Lord Chancellor does not appear to have objected to the legality of that expedient, but merely stated his apprehension "that the notes would be bought for little or nothing." Even for a petitioner's creditor debt, the necessary amount may be completed by bills or notes made before, but not indorsed to the petitioner till after the act of bankruptcy. *Glaister v. Hewer* (d). And although the general rule is, that trustee and *cestui que trust* must join in proof, yet if the Court is satisfied that the whole legal interest is in the trustee, he may prove alone; *Ex parte Dubois* (e). Contrivances have been sanctioned for the purpose of assisting parties to prove, where otherwise they would have been excluded by reason of difficulties somewhat analogous to the present case. In *Ex parte Cox and Greenwood*, cited in *Ex parte Rogers* (f), which was the case of the Portsmouth Bank, it appeared "that the sailors of several ships had received their wages and prize monies in the notes of that bank, and the Admiralty to prevent discontent in the fleet had taken up the notes from the sailors, and afterwards applied to prove the amount against the estate of the bank, upon which occasion the Lord Chancellor made the order with a direction that the Admiralty should not interfere in the choice of the assignees." It is true that afterwards, in the case *Ex parte Bank of England*, in the matter of *March and others* (g), the Lord Chancellor did not admit the case of Portsmouth Bank as an authority, inasmuch as the application had not been opposed; here the assignee was not opposed to the relief sought by the claimants, but submitted the question to the decision of the Court for its protection, and, therefore, the case of the Portsmouth Bank might be relied on. In a subsequent case, *Ex parte Gordon* (h)—decided in 1834, upon an application for an order that one person might prove on behalf of a large number of creditor holders of £1 notes, he not interfering in the choice of assignees, or with

(a) Buck. 490.

(c) 17 Vesey, 202.

(e) 1 Cox. 310.

(g) 2 G. & J. 368.

(b) 1 P. Wms. 782.

(d) 7 T. R. 498.

(f) Buck. 490.

(h) 1 M. & A. 282.

the certificate—the Portsmouth Bank case appears to have been adopted as an authority, and an order was made according to the application. If the Court should be of opinion that the case of the Portsmouth Bank and *Ex parte Gordon* were authorities, considerable assistance might be derived in arriving at a satisfactory judgment, at all events in respect to Burke's claim—for it appeared from his affidavit that he purchased the notes for the purpose (and the event shewed it to be so) of facilitating the arrangements of claims upon the estate. It could not be fairly said that because Burke purchased more notes than turned out to be necessary for the useful purpose just mentioned, he therefore should be at a loss, and considered disentitled to the benefit of the exception to the general rule established in the case referred to. The Commissioners in Cork were certainly in error for continuing to receive proofs on the 1st July 1836; and although, strictly speaking, those proofs could not now be dealt with by the Court as legal evidence of claims admitted under the commission, yet still there was enough in the fact to satisfy the equitable discretion of the Court, that the parties from whom these notes were purchased, after such proof had been before the commission, were *bonâ fide* holders. Under all the circumstances that had occurred it was now utterly impossible for either Connell or Burke to bring the original holders of the notes before the Court, either by affidavit or otherwise; and although in the case of a commission against another county bank, the learned Commissioner Macan had most properly suggested and framed a form of proof by which twenty or more holders of notes could be included in the one deposition, yet even this could not be now resorted to, as none of the parties were known to the previous claimants. There is no doubt but that the assignee of a debt can prove in the name of the original creditor; *Ex parte Lloyd* (a); but as this in the present case was impossible, it remained for the Court to say whether, under circumstances which could be neither controlled or proved by the claimant, they should be left, notwithstanding an actual advance of their money, upon the faith of those securities and for *bonâ fide* purposes, without relief.

Mr. *Leslie*, for the assignee, did not in any way dispute the doctrine of *Ex parte Lee* (b), cited by Counsel for the applicants. It is necessary to prove by evidence, satisfactory to the Court, that at the time of the commission the notes were in the hands of a *bonâ fide* holder entitled to claim to the full amount whether as indorsee or otherwise. He admitted, that after the notes were proved, it was competent to the party to assign the right to receive the dividend. The case of *Ex parte Rogers* (c), cited

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(a) 1 Rose, 4.

(b) 1 P. Wms. 782.

(c) 1 Buck. 490.

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on the other side, was a distinct authority upon that point, for the position for which he contended. In the present case, the only proof that the claimants have of establishing that the holders of the notes at the time of the bankruptcy were entitled to prove them, is their own belief, founded upon statements made to them. In *Ex parte Dickenson (a)*, Sir George Rose says, that where a creditor assigns his debt (bills of exchange) this does not give the assignee a right to prove it, but merely to call on the assignor to do so. In *Chitty on Bills*, 9th ed. p. 708, this is treated as the settled law. The form of affidavit is given in *Archbold's Bankrupt Law*, which requires the person proving, to state that he is a *bonâ fide* holder. The principle of this rule is obvious; it is only to the *bonâ fide* creditors at the time of the commission that the fund is to be paid, and the creditors have a right to the benefit of every equity existing between the bankrupt and the holders, of which they are not to be deprived by any subsequent arrangement, although for value: otherwise debts might be created after, which did not exist at the bankruptcy. There is no satisfactory evidence before the Court, to shew that at the time of the issuing of the commission, these notes were in the hands of *bonâ fide* holders. If Burke's affidavit is permitted as evidence of that fact, he can only say that he received them for other parties; and it is utterly impossible that in the purchasing of notes for the purpose of setting them off against debts due the estate, he could take upon himself to say that the parties for whom he purchased were *bonâ fide* holders. If the *Portsmouth Bank Case* were law, it might go far in inducing the Court in a peculiar case to deviate from the ordinary rule and adopt a different practice; but in the present case there can be no necessity for such a course: and it cannot be established that if a party be ignorant of the law, the Court will work an injustice to the other creditor by permitting such a proof to be received. The assignees were not personally opposed to the claims, nor had they any doubt of the truth of the case made by Messrs. Connell and Burke, but they considered themselves bound to have the opinion and sanction of the Court on the question.

Mr. COMMISSIONER MACAN.

This is a most important case—its importance arising more from the principle which it involves, than from the sum of money in question, although that is not inconsiderable. It is a claim made by two persons named William Connell and John Burke, both of the city of Cork, brokers and money agents, for liberty to prove against the estate of Mr. Delacour, the bankrupt (who had been a banker), for the amount of certain bank notes issued by him, of which they became the purchasers from various parties, not only subsequent to the act of bankruptcy, but

(a) 2 Deacon & Chitty, 520.

long subsequent to the date of the commission. But the application is made without satisfactory, if any, evidence, to shew that the parties from whom the notes were purchased were themselves *bonâ fide* holders for value, so as to entitle them to prove against the estate. It is founded upon the affidavits of the claimants alone, without any affidavits (that this Court can recognise) by the former holders, the vendors. It is indeed averred that a considerable portion of those notes were proved by the then holders, before the Commissioners of Bankrupt, in Cork, upon the 1st of July 1836; but it cannot be doubted that their jurisdiction ceased upon the 30th of June; and, therefore, even if such affidavits were now before me, the claimants could not derive from them any aid. It is admitted by Counsel for the claimants that this application is a departure from the general rule in bankruptcy, viz., "That where a debt is assigned (and *a multo fortiori*, after the date of the commission), both the assignor and assignee, the vendor and vendee, the trustee and *cestui que trust* should join in the affidavit of debt, the one pledging himself to have been a creditor for full and fair value at and before the date and issuing of the Commission, and both, that the debt was never paid; their joint depositions clothing the assignee or vendee with all the rights to which the assignor or vendor was entitled."* It is contended that to this general rule there are some exceptions, and Counsel has endeavoured to shew that the circumstances of the present case would bring it within some of those exceptions. To judge justly of this argument, all the circumstances of this bankruptcy ought to be taken into consideration, and those circumstances may be thus briefly, and, perhaps, usefully stated. It appears that on the 4th of May 1835, Mr. Delacour, who had carried on trade as a banker in Mallow for forty years, committed an act of bankruptcy, by beginning to keep house or by closing the bank doors—that is, I presume, absenting himself. The act of bankruptcy was committed at ten o'clock in the forenoon, and the bank stopped payment at the same hour. Upon the 11th of May, seven days after the act of bankruptcy, a commission was issued, which the Lord Chancellor superseded by writ bearing date the 13th of June; and on the 28th of July 1835, the commission which is now in force was issued. On the 30th of June intervening, trust-deeds under the Bankers' Act † had been executed; and in consequence of the clashing of rights between the trustees under the Bankers' Act and the petitioning creditors, and assignees (if appointed) under the Commission of Bankruptcy, a petition was presented to the Lord Chancellor on behalf of the trustees, praying to have the estate administered under the Bankers' Act, and not under

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* The form of affidavit may be seen in *Archbold's Practice in Bankruptcy*, appendix, p. 39, 45; and in 2 M. & Ayr. p. 41; 1 M. & Ayr, 126, 127.

† 33 G. 3, c. 114.

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the Commission of Bankruptcy. The question depended upon the priority of rights under these two acts; and an order was accordingly made by Lord Chancellor Plunket, directing an action of trover to be brought by the petitioning creditor, which was tried in the Common Pleas, and a verdict found by a special jury, containing, among other findings, "That Delacour committed an act of bankruptcy by closing the bank doors at ten o'clock in the forenoon on the 4th of May 1835;" and by the sixth finding, "That the bank stopped payment within the meaning of the Bankers' Act, at the same hour." The Common Pleas afterwards held unanimously, that whether the bankruptcy was before or cotemporaneous with the stoppage, the Bankrupt Act took precedence of the Bankers' Act, and that the assignee should have the administration of the property. This judgment was given upon the 7th of June 1836, more than twelve months after the act of bankruptcy and the issuing of the first Commission, and these twelve months were occupied in wasteful litigation. Upon the 15th of June 1836 (the Lord Chancellor's restraining order having been discharged), a meeting was held before the Commissioners in Cork, and the 27th fixed for the surrender of bankrupt, and the 28th for proof of debts and choice of assignees. I enter into the detail of the proceedings because they constitute some of the circumstances affecting the case of the present claimants; but in doing so, I disclaim sincerely and earnestly all thoughts of observing unkindly, much less of casting any reflexion upon the Cork Commissioners. I am thus bound to state, that from the 15th of June to the 1st of July, *inclusive*, there were no fewer than twenty meetings held before them in Cork, where the claimants reside; many of these meetings being for proof of debts, at any one of which the claimants, or the then holders of the notes in question, might have proved. It was thought desirable that a provisional assignee should be appointed at one of those sittings, although the estate had been without one for thirteen months; and all the expense of executing deeds of assignment and of bargain and sale was thus incurred and entailed upon the estate. At a subsequent meeting upon the 30th of June, the present assignees were chosen; and then followed all the attendant expense of further deeds from the provisional to the regular assignees. Long before any of those meetings were held in Cork, the present statute creating this Court had passed the Legislature, namely, upon the 20th of May 1836, and upon the 1st of July 1836 came into operation. It is quite clear, and is now admitted, that the jurisdiction of the former Commissioners in Dublin, and that also of the Commissioners in Cork, ceased on the 30th of June; and if that day had been allowed to expire, the whole estate of the bankrupt, of whatever description, would, by operation of the statute, and without any expense, have vested instantly and absolutely in the assignees—the statute itself, sections 74, 75, 76, 77, now operating as an assignment,

and this being one of the very salutary and important reforms in the Bankrupt Law of this country. The 28th of July 1836 was the first day upon which any meeting in the matter was held under the present jurisdiction. An application was then made to me to postpone the final examination of the bankrupt; and, sufficient reasons being laid before me, I accordingly adjourned the final examination from that day to the 1st of September, to afford time for a petition to the Chancellor, then pending, to be disposed of, praying for a Special Commission, under the 57th section, to prove debts and pass the bankrupt's final examination in Cork. The application for this Special Commission was grounded upon the extreme delicacy of the bankrupt's health, his inability to attend in Dublin, and the facility that the holders of notes—and more particularly those of the humbler class—would have in proving them in Cork, before the Special Commission, if appointed. In consequence of the pendency of this application, a further adjournment until the 28th November 1836, of the final examination of the bankrupt, took place, this Court permitting any debts upon the estate to be proved in the mean time. The Lord Chancellor refused the application for a Special Commission, his Lordship not conceiving the circumstances of the case at all called for the exercise of the extraordinary jurisdiction under the 57th section. This Commission of Bankruptcy, therefore, did not begin to work in this Court until 1837, and in six months afterwards (the time contemplated by the statute as sufficient for a dividend), debts to the amount of all but £54,000 were proved, and a dividend of 5s. in the pound, amounting to the sum of £13,500 was paid. From the 1st of July 1837 to August 1839, some Equity suits were instituted by the assignees under the direction of this Court, to set aside family settlements, and these suits were all successful. Up to the 8th August 1839, debts to the amount of all but £55,000 were proved, and a further dividend of 9s. upon the entire sum was paid, making in all a dividend of 14s., and a further dividend of 1s. was made upon the 16th January 1841; this Court, reserving in the assignee's hands, sufficient to cover the allowance to the bankrupt of £600, and to indemnify them against the costs of an Equity suit then pending. During the whole of these proceedings both in Cork and Dublin, so calculated to attract and fix the attention of all persons interested in the estate, neither the present claimants, nor the then holders, appear to have taken any step to prove their notes, or establish any claim against the estate. But this dividend having been declared, and there being a reasonable expectation that the estate (independent of the £600 reserved for the bankrupt) would be sufficient to pay in addition one shilling, or one and sixpence in the pound more, Messrs. Connell and Burke present their claim upon the 9th January 1841, to be admitted to prove and receive dividends upon these notes. Burke's case is distinguished from Connell's, but both appear to be money

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brokers and insurance agents in Cork, and their affidavits state that in the course of their trade, they purchased these bank notes from persons whom they believed to be *bonâ fide* holders before the date and issuing of the commission; but there are no facts mentioned in either of their affidavits to enable me to form even a well-founded belief that the vendors were such *bonâ fide* holders. Again, there is not the remotest mention in any of the affidavits of the *time* when, or the *place* where, or the *price* for which, or *any other of the circumstances* under which the purchase of the notes was made. In a mercantile Court, the open *bonâ fide* purchase of bills of exchange or notes, ought to be considered as legitimate a transaction as the purchase of a cargo of wheat. It occurs every day on 'Change. But when parties, who from their occupation in life are necessarily well acquainted with money dealings, present themselves to this Court under the unfavourable fact of having purchased bank notes from poor holders, confessedly after the bankruptcy, and perhaps after they knew that fourteen or fifteen shillings in the pound had been paid, they are bound to disclose *when*, and under *what* circumstances, and for *what consideration* these notes were purchased. Perhaps they had paid but five shillings in the pound, or less for them; or possibly the applicants commissioned the parties to purchase the notes for them. I am led to suppose that it was conceived to be a good speculation, for Burke admits in his affidavit, that he purchased to sell again to debtors to the estate, and that he over speculated. This, in a great measure, betrays Connell's case. Burke does not even appear to have bought with the intention of proving, but for the purpose of selling them to the debtors of the estate, the assignees having made an arrangement (as he alleges) to receive payment of debts due to the estate in the notes of the bankrupt. Something having then occurred to check the market, and Burke having on his hands a considerable sum of money in these notes, applies to this Court to be permitted to prove, and receive dividends upon them. With respect to the alleged arrangement between the assignees and the debtors to the estate (if such were ever made), this Court never sanctioned it. In particular instances, the assignee may, with the sanction of a gazetted meeting of creditors, or of this Court (section 102), have thus, or otherwise compounded with debtors of the estate, but upon reference to the file, no authority whatever appears to have been given for any such general arrangement. It never could receive my sanction, as I consider it directly contrary to the spirit and policy of the bankrupt law, some of the express provisions of which would be thus expressly defeated—for instance, that relating to set-off; and that I am fully warranted in thus considering, will appear from the case of *Staines and others, assignees of Birch v. Wainwright (a)*, decided in 1839, "Where an

(a) 6 Bing. N. C., 174.

"agreement had been entered into by the defendant to pay the plaintiffs, "the assignees of a bankrupt, a certain sum of money supposed to be "equal to ten shillings in the pound, upon all debts then proved, the fiat "to be worked in the usual way, a claim of defendant of £700 to be "allowed in full, the assignees to pay the costs of the bankruptcy, the "surplus of the estate to be divided amongst the creditors; but the divi- "dends of those who had previously received ten shillings in the pound, "to be paid over to the defendant, and the excess beyond ten shillings in "the pound to belong to the creditors." It was held that this agreement was void, as contrary to the policy of the bankrupt law. C. J. Tindal, in giving judgment (a), says:—"This agreement may possibly be very "beneficial to the creditors, but (as he says in another place) the as- "signees have no right to enter into a contract with a particular creditor, "that on a certain event he should receive out of the estate, the full "amount of any debt. It was their duty to make an equal distribution "of the effects among the creditors, in proportion to all the debts of the "bankrupts." As to the merits of the present application, *Ex parte Deey* (b), cited by Counsel for the applicants, bears directly upon the question, whether claims such as the present should be encouraged in a Court of Bankruptcy. In that case, it was held that a bill of exchange, having been indorsed after the bankruptcy of the acceptor, the indorsee could only prove such debts as the indorser could have proved at the time of the bankruptcy. It is equally clear that the purchaser of bank notes or securities cannot prove any other debt than the indorser or vendor could have proved. The state of the mutual credit or equities between the bankrupt and the holder at the time of the bankruptcy, cannot be altered. As to the necessity of such holder joining in the proof, or making a separate affidavit in support of it, the case of *Ex parte Dubois* (c) seems conclusive. The Lord Chancellor (d) says—"The reason why a "trustee is not permitted to prove the debts alone under the Commission "is, that he must swear to the debts being due to him. Now the debt "being only due to him in trust for another, it is rather too great a "refinement for him to take such an oath, and if he swears the debt is "due to him as trustee only, that is not sufficient; for it does not ap- "pear, with certainty, that the debt has not been paid to the *cestui que* "trust." The *cestui que trust* must, therefore, join the trustee in swear- ing that no part "of the debt has been paid or secured." The case of *Ex parte Lloyd* (e), decided in 1810, besides being an authority to shew (page 8) that any creditor who has a debt proveable under a Commission of Bankruptcy, is entitled to sell the debt with his advantages and equities,

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(a) p. 179.

(b) 2 Cox, 423, (1796.)

(c) 1 Cox, 310.

(d) p. 311.

(e) 1 Rose, 4; 17 Vesey, 245.

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In re
 DELACOUR,
a Bankrupt.

puts the rights of both on the true footing. The Lord Chancellor, in his judgment (a), says:—"The question is not whether the assignee of the judgment can himself prove, but whether he is not entitled to call upon Conway, Phelps and Co. (the assignees) to prove for him. When he advanced the money, he purchased *all their remedies and advantages*, and, therefore, he is entitled to prove in their names." The marginal note of this case totally omits the latter words, and, like numberless other marginal notes, is calculated to mislead. In seeming contradiction to this case, Sir George Rose is made to say in *Ex parte Dickenson* (b), page 528, "A creditor cannot, after a Commission against the debtor, sell his right to prove." But in the same page he states the principle thus:—"The assignment of a debt does not confer upon the assignee the right to prove it, but merely the right to call upon the assignor to prove the debt in trust for the assignee." The *Salisbury Bank Case, Ex parte Rogers* (c), is very similar to the principal one, and is an express authority against the claim now made. There, the petitioner's testator had bought up, after the bankruptcy of the bank, their outstanding notes from various holders, which notes the petitioner sought to prove, but there was no evidence from whom the petitioner bought the notes, or that they were the subject of proof in the hands of the former holders; and the Vice-Chancellor, in his judgment, says:—"There can be no proof in respect to those notes, unless it be established that at the time of the bankruptcy they were in the hands of holders, who were entitled to prove them under the Commission." The petitioner's Counsel appears to have referred to the *Portsmouth Bank Case*, and though it does not seem to have been treated as law in *Fauntleroy's Bankruptcy* (d), where it is cited (page 364) as *Ex parte Cox and Greenwood*; yet, if any case analogous to it comes before me, I shall not hesitate to act upon its authority. The *Portsmouth Bank Case* establishes two exceptions to general rules, as to proof of debts in bankruptcy. First: that under urgent circumstances, the Court will allow an agent to prove for the principal; and, secondly, that it will permit *bonâ fide* purchasers of bank notes, purchased from *bonâ fide* holders for full value, even after the Commission of Bankruptcy, to make proof of them. I do not mean by full value, twenty shillings in the pound, but whatever the full marketable value may be at the time. In the present case, there is no evidence whatever to shew what value was given for the notes in question, either by the former holders or the present claimants. In the *Portsmouth Bank Case* it is quite clear, that full and meritorious value had been given by the former holders, the sailors, who received them for their

(a) p. 9.

(c) Brick. 490 (1820).

(b) 2 D. & C. 528 (1838).

(d) 2 Glyn. & Jan. 363 (1838).

wages and prize-money; and the Admiralty, upon grounds of public policy, took up the notes from them for the full value. But even in the *Portsmouth Bank Case*, the Lord Chancellor in making the order, directed that the Admiralty should not interfere in the choice of assignees or the certificate. The report in *Rose* does not contain the latter restriction; but this is a mistake, as distinctly appears from the note of Mr. *Montague* (a). The principle of the decision in this case is further exemplified in *Ex parte Atkins*, which is also in *Buck*, p. 479, and was decided the day before *Ex parte Rogers*, though not referred to in it. There, a Commission had issued against the petitioner and his partners, who were bankers; the petitioner had got his certificate, and there being a great many notes of the bank outstanding in the hands of indigent persons, the petitioner, in order to assist them, and under the supposition that the joint estate would pay twenty shillings in the pound, had taken up the notes at their full value to a large amount, and petitioned the Court to prove the notes so taken up, under the joint Commission. The Vice-Chancellor, in permitting him to prove for such sum as he should appear to have paid since his certificate, says:—"I make this order upon his affidavit and in the confidence, as he was a partner, that he would not have paid the notes unless the holders had a valid claim upon them against the firm. I must otherwise have directed an inquiry, whether these notes were, at the time of the bankruptcy, provable against the estate." In the case before me, I make the very same inquiry, but I look in vain for any satisfactory answer. *Ex parte Dickenson* (b), already referred to, besides confirming the true principle as laid down in *Ex parte Rogers*, is an express authority that the vendor and vendee, the assignor and assignee, the trustee and the *cestui que trust*, should join in the deposition or make distinct depositions; that there must be thus, or from other circumstances, satisfactory evidence that the assignors or vendors were themselves *bonâ fide* holders or creditors for full value before the date of the Commission. In *Ex parte Dickenson*, the assignor and *bona fide* creditor before the bankruptcy (Aldridge) made a deposition in support of the claim. Yet, even so, the observations of the Judges of the Court of Review are strongly confirmatory of my opinion in the present case. In page 533, Sir John Cross says, "Aldridge only states in his affidavit, that he gave a good and valuable consideration for the bills. But *what* this consideration was, or *when* it was given by him, or *where* the transaction took place, is altogether studiously concealed." I cannot find in the affidavits of Messrs. Burke and Carroll any mention as to the sum they paid for those notes, or the time when, or the names of the parties from whom, or the circumstances

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(a) 1 M. & Ayr. Practice of Bankruptcy, 125. N. 4.

(b) 2 Dea. & Chit. 520.

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Bankruptcy.
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a Bankrupt.

under which they were purchased. As to *Ex parte Gordon* (a), cited by Mr. Creighton, it merely decides (even if authority) that under a fiat against a banker, one person may be allowed to prove on behalf of a large number of holders of one-pound notes, not interfering as to the assignees or the certificate. But I consider it to be a case of no authority. The report contains just seven lines, without any statement of facts or evidence. Counsel cited the *Portsmouth Bank Case*, although it does not appear that there was any important fact common to the two cases, and he is made to say that a similar order was made under the bankruptcy of *Fauntleroy* (b); although, as far as can be discovered, the application in the latter case was refused. I may add, that I have searched the cotemporaneous Reports (c), and although the volume contains no fewer than seven cases in the same *Re Maberly*, no notice is taken of *Ex parte Gordon*.

Upon the whole case, and after very anxious and careful attention, it appears to me that the claim is essentially defective. First, there is no evidence that the parties from whom the notes were purchased were themselves *bond fide* holders, for full or any value, at and before the issuing of the Commission. Secondly, there is no evidence that the claimants are themselves *bond fide* purchasers for full or fair value, under circumstances to entitle them to prove. Indeed, the evidence is rather that they purchased those notes under circumstances disentitling them to prove; that they even speculated upon a presumed arrangement for settling with debtors to the estate, which ought to be strongly discountenanced. It has been argued, that it was impossible for the claimants to comply with the required formalities of proof—that is, I presume, upon the principle, that "*Lex neminem cogit ad impossibilia.*" But if Messrs. Connell and Burke are unable to tell this Court the *time*, or *place*, or *price*, or other circumstances connected with their purchase of those notes, the fault is theirs; for they were bound to have ascertained those facts at the time of purchasing, and to have preserved the evidence of them, so as to be able to bring them before the Court now, and they might and ought to have done so. As to the observations upon the expense of getting the former holders and vendors to join in the proof, it is to be recollected, that after this Court had settled a form of general affidavit to meet this very difficulty, the assignees inserted advertisements in the Cork and other Newspapers, stating that a Master Extraordinary would attend on particular days specified, for the purpose of receiving affidavits of debts in the principal towns in the country; and proofs to a very large amount were thus accordingly made.

Upon every consideration of the case, I have come to the conclusion

(a) 1 M. & A. 282.

(b) 2 G. & J. 363-6.

(c) 3 Dea. & Chit.

that these claims ought not to be admitted at present, if at all; leaving the claimants, however, at liberty to bring before me any additional evidence within a reasonable time before the final dividend, at a public meeting for proof of debts, the expense of which cannot be thrown upon the estate, and must be borne by the claimants. Should they neglect to avail themselves of the further opportunity thus given them, the fund will be divided without regard to their claims, which will be struck out altogether.

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Bankruptcy.
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a Bankrupt.

In re FAHY, a Bankrupt.

THE Commission in this matter issued in 1830, and Mr. Richard O'Gorman was chosen assignee; he filed his first account upon the 14th April 1831, and it appeared that the estate was then indebted to him in £80. 5s. 10½d. From the year 1833 the assignee had funds belonging to the estate in his hands; and a balance of £120, which remained in his possession for some years, was now lodged in bank to the credit of this estate. On the audit of the account, a creditor named McCormick attended, and required the assignee to be charged with the penal interest created by the statute, for retaining money of the estate in his hands, and in this way the case came before the Court.

Mr. *Creighton*, for the assignee.—Assuming that there is a balance in O'Gorman's hands, the question is, has the present Court jurisdiction to charge penal or any interest on the sum? The 49 G. 3 (Sir Samuel Romilly's act) is the first statute which, in relation to the Bankrupt Law in Ireland, legislates with respect to the assignee being charged with interest. The 3rd section of that act enacts—That if the creditors, before the choice of assignees, do not direct into what bank the money, as often as it shall exceed the sum of £100, shall be paid, the Commissioners shall give such directions. The 4th section enacts—That assignees disobeying the directions of either the creditors or Commissioners, shall be charged twenty per cent. per annum interest, on the money retained or employed contrary thereto. Upon this state of the law, so existing up to the 31st June 1836, the liability of O'Gorman must be determined by the question, whether the direction had been given either by the creditors or the Commissioners. Upon examination of the file it will be found, that at the meeting which took place upon the 9th December 1830, for choice of assignees, no directions appear to have been given; and, therefore, the assignee is clearly exonerated from the liability he would have been subject to, had the requisites of the statute been complied

June 11.
Assignee not chargeable with penal interest for the detention in his hands of monies of the estate, if direction was not given under the 49 G. 3, c. 121, ss. 3 & 4, and under the 122nd section of the 6 W. 4, c. 14, by the creditor or Commissioner to lodge such monies in Bank.

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Bankruptcy.
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a Bankrupt.

with. O'Gorman not having been appointed assignee by the present bankrupt jurisdiction, the Court cannot deal with this case summarily. The 122nd section of the Bankrupt Act must be read with the 120th, which section points out the office of the Court; and the 122nd must be taken as corollary to that function created by the 120th. No words, by any force of construction, can give a retrospective effect to these sections. It is also plain, that the 120th and the 121st sections are to be read together. The latter section empowers the Commissioner to direct any money of the estate to be invested in Exchequer bills, or in the public funds. This is a new enactment, giving a distinct authority to the Commissioner, which he is entitled to exercise, no matter what the date of the Commission may be, whether before the 1st of July 1836, or after. In the absence then of the direction, not only of the former Commissioner, but of the present jurisdiction, as explicitly required by the 120th section, the Court has no authority to adjudicate on the case. A question has been raised as to whether twenty per cent. ought to be charged once upon the whole sum retained, or twenty per cent. annually. The words of the penalty in the 128th section, for neglecting to file an account in the Bankrupt office of unclaimed dividends remaining in their hands, are "twenty per centum *per annum*." In the 122nd section, the words are twenty per centum, suggesting a plain distinction from the penalty in the 128th. In *Ex parte Lowe, In re Aaron (a)*, this question has been ably discussed; and the Vice-Chancellor, in giving judgment, said—"It is unnecessary for me to consider what might be my own speculations as to the probable intention of the Legislature with respect to the omission of the words '*per annum*;' because, in fact, they are omitted. I cannot, therefore, consider the section in the same manner when they are omitted, as if they had been inserted. It is a penal clause, and with respect to the penalty, must, according to all rules of construction, be construed strictly. Therefore, I cannot think myself authorised to say, that the assignees can be charged with twenty per cent. *per annum*, without which the Bankrupt cannot have any interest." The same case was again heard before the Court of Review, and Sir G. Rose's judgment agreed with that of the Vice-Chancellor (b): Pell *dissentiente*. The Court must also be satisfied that there has been a culpable retention by the assignee: *Ex parte Benham (c)*.

MR. COMMISSIONER MACAN.

The question for adjudication in this case arises on the 122nd section of the Bankrupt Statute. In the account produced to me, it appears that

(a) Montague, 392.

(b) Sir L. Shadwell.

(c) 1 Deacon, 26, 37.

there was about £120 in the hands of the assignee which was not lodged in bank. This balance would be, therefore, about eight years in his hands. Counsel for the assignee has referred to Sir Samuel Romilly's Act (a), which explicitly points out the duty of the former Commissioners in giving directions as to the lodging in bank or otherwise monies arising from the bankrupt's estate in default of the creditors giving such directions; and the 4th section proceeds to describe the responsibility incurred by the assignee in disobeying such direction, if given. The duty of charging the assignee with £20 per cent. if liable, was as incumbent on the former Commissioners as on us. The 3rd section of Sir Samuel Romilly's Act recites the 5 G. 2, by which the power was given to the creditors, at the meeting for the choice of assignees, to direct, "if they thought fit," how, and with whom, and where the monies arising from the bankrupt's estate were to remain until divided, but which required that this direction should be given *before* the choice of an assignee. The 120th section of the present statute enlarges this power on the part of the creditors, by permitting them to exercise it at any time during such meeting, leaving it still optional with the creditors to exercise this power or not. But both statutes make it equally the bounden duty of the Commissioners to give that direction, if the creditors should not give it. It is clear, therefore, that before I can pronounce the assignee liable to pay this penal interest under the 49 G. 3, I must see whether the necessary directions had been given under that statute. I am bound to say, that upon examination of the file, it appears that no direction was given, either by the creditors or the then Commissioners. At the meeting for the choice of assignees, nothing appears to have been done as to the selection of a bank; and the blanks in the printed form of the appointment of assignee are neither filled up or signed either by the creditors or the Commissioners, nor does the memorandum of the day contain any mention of such direction having been given. The objection by Counsel for the assignee is therefore well founded, as to his liability to be charged with this interest up to 1st July 1836. As to the remaining period, the question is a serious one. The 122nd section does not refer in terms to the 120th; and it would seem that the assignee being or not being chargeable with penal interest, did not depend on the previous direction in the 120th; but that the assignee was so liable, if he retained in his hands or employed for his own benefit any sum, &c., to the amount of £100, whether the direction were or were not given. But it appears to me that the words, "when so directed as aforesaid," in the 6th line of the 122nd, refer to the 120th as much as to the 121st section. The 122nd section, after having disposed of the first part, namely, the retaining or employing of the money by the assignee, proceeds then to a third

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a Bankrupt.

(a) 49 G. 3, c. 121, ss. 3 & 4.

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possible default, namely, his neglecting to invest the money of the estate, if so directed by the Commissioners, according to the 121st section. I agree with Counsel for the assignee, that the 122nd section must be read in reference to the 120th as well as to the 121st; and as the 120th is prospective, and no discretion was or could have been given under it, that therefore the assignee is not chargeable with penal interest under the 122nd. Upon this and former occasions, I have given the sections upon which this question arises very great consideration; and I do not now mean to say whether or not, in a plain case, I would have power to carry back the 122nd section of the present act, and make it applicable to a direction given under the 49 G. 3. The result of my consideration in the present instance is, that in order to make the assignee liable to the heavy responsibility under the 122nd section, there must be a direction by the creditors or the Court; and that under this or the former act, that section cannot be enforced without such a direction. It is not uninteresting to notice that in the corresponding English act,* the words are, "Every such assignee shall be liable to be charged." In the Irish act, the words are absolute, "shall be charged." I may add, that were it not for the interposition of the 121st section, the 120th and 122nd might be read together, as the 3rd and 4th sections of the 49 G. 3, c. 121; and if that be a sound construction, it is confirmed by words of the 122nd section, "when so directed as aforesaid," plainly referring to the 120th section.

Ex parte Bonham (a), has been cited to shew that the Court must be satisfied that there has been a culpable retention by the assignee before the penal interest can be charged. But it is unnecessary for me now to enter into any examination of that case. I must, however, observe, that this marginal note in 1 *Dea.* 26, is not warranted by the report itself—The case is also reported in 2 *Mt. & Ayr*, 272, but no such proposition is laid down there, and that according to my present impression, there is nothing in the statute itself to justify the construction given in the marginal note referred to.

* 6 G. 4, c. 16, s. 104.

(a) 1 *Deacon*.

1841.

Rolls.

In the Matter of JANE COWAN HERON, MARGARET HERON,
and JAMES HERON, *Minors.*

(*In the Rolls.*)

June 5.

By deed of settlement bearing date the 27th of December 1833, made previous to the marriage of James Heron, then of Tullyveery in the county of Down, and Margaret Cowan, then of Ballylintosh in the same county, and by and between the said James Heron of the first part, the said Margaret Cowan of the second part, and trustees of the third part;— after reciting that Samuel Cowan deceased, father of the said Margaret, being seized in fee of the lands of Carnew, Benagh and Lisnacraffin in the county of Down, by his will duly executed, devised them upon trust “to permit and suffer his four daughters to take and receive equally, “share and share alike as tenants in common, the rents, issues and profits “of the said lands during their natural lives, for their sole and separate “use, without the control, and not subject to the debts of their respective “husbands;” and from and after the death of each of said daughters, then to permit and suffer the child or children of such daughter so dying to take and receive her fourth share of said rents and profits, share and share alike: and in the event of any of said daughters dying childless or without living issue of a child, then such daughter to have power, notwithstanding coverture, to dispose by will of one-fourth share of said rents and profits as she should think proper; and in default of such appointment, that the surviving sisters should be entitled to said fourth part in like manner as to their original shares: that the said will was duly proved, &c.; and that the said Margaret was further and otherwise entitled to two sums of money, amounting together to £700.

That the said James Heron was seized in fee of the lands of Tullyveery in the county of Down.

That a marriage was then intended between the said James Heron and Margaret Cowan, and upon the treaty of the said marriage it was “agreed, that the estate and interest of the said Margaret in the said “lands of Carnew, Benagh and Lisnacraffin, and the rents, issues and

Equity will execute a contract in bar of dower entered into before marriage by an adult woman not under disability, where such contract is reasonable, although by its terms the lady, being left a widow, has no provision out of her husband's property, and the provision made for her out of her own is insufficient to support her in her rank of life. The Court, however, will see that the widow gets what she contracted for in lieu of dower.

Equity makes no distinction between the right of dower and other rights, and does not extend any more favour to one than to another, but equally protects all. The decision and

the *dicta* in *Power v. Shiel*, 1 Mol. 296, considered.

Upon a reference to inquire as to the ages and fortunes, &c., of three infants, and to appoint guardians, the Master reported that they were respectively of the ages of five years, three years, and two years; that their mother would be the proper guardian of their persons, and that two of them, being females, were entitled to certain property out of which £10 per annum should be allowed for the maintenance of each; that the third, being a boy, was entitled as heir-at-law to the freehold estates of which his late father was seized in possession, subject to his mother's right of dower thereout, and that £100 per annum would be a proper allowance for his maintenance. The Court having allowed an objection to the finding as to the right of the minors' mother to dower, upon the ground that she was barred of dower by her settlement, increased the allowance for the maintenance of the male infant from £100 to £150 per annum.

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"profits thereof [should] be settled and conveyed to the use of the said
 "James Heron *during the joint lives of himself and the said Margaret*,
 "notwithstanding any limitations of same in the will of the said Samuel
 "Cowan deceased, to her separate use, and from and after the decease of
 "either of them, then to the several uses, intents and purposes, declared
 "of and concerning the same in the said will of the said Samuel Cowan
 "deceased."

That it was *further agreed* upon the said treaty, that the said two
 sums amounting together to £700, to which the said Margaret was entitled,
 should be assigned *upon trust* "to permit the said James Heron to re-
 "ceive the interest of said monies during his natural life, and at his
 "decease to or among the issue of said intended marriage," according
 to his appointment, and in default of appointment share and share alike;
 and in case there should be no issue of said intended marriage, *then* to
 the executors and administrators of the said James Heron absolutely.

That it was *further agreed* on the said treaty, "that the said James
 "Heron [should] grant and secure to the said Margaret a rent-charge or
 "annuity of £50 sterling, charged upon the said lands of Tullyveery
 "aforesaid, to be payable to her from the time and in the manner *and*
 "event [thereinafter] mentioned.

It was then witnessed that in pursuance and execution of the said
 agreement, and in consideration of said intended marriage, and of the
 release thereafter made by the said James Heron, and of 10s., &c.,
 she, the said Margaret Cowan, released to the trustees (then being in their
 actual possession, &c.) her one-fourth part or share of the said lands of
 Carnew, Benagh and Lisnacraffin, and also all other the estate and interest
 of the said Margaret, of and in the said lands, and every part thereof, in
 possession, contingency, remainder, expectancy and otherwise, under the
 will of her father Samuel Cowan,—to hold, &c., "*upon trust* to permit
 "and suffer the said James Heron and his assigns to receive and take
 "the rents, issues and profits of the said before granted premises, and
 "every part thereof, *for and during the term of his natural life*, for his
 "and their own use and benefit, any thing to the contrary thereof in the
 "said will of the said Samuel Cowan contained in anywise notwith-
 "standing; *and from and after the decease of the said James Heron*,
 "then upon the several trusts, and to, for and upon the several uses,
 "intents and purposes declared of and concerning the same in and by the
 "said recited will of the said Samuel Cowan deceased, or such of them
 "as [should] be then capable of taking effect."

The indenture further witnessed, "that for the causes aforesaid, and
 further to effectuate the said recited agreement," the said sum of
 £700, to which the said Margaret was entitled, was granted and assigned
 to the trustees and the survivor, &c., "*upon trust* to permit and suffer
 "the said James Heron and his assigns, for and during his natural

"life, to take and receive the interest of the same ; and from and after "his decease, in case there [should] be any child or children of the "body of the said James Heron on the body of the said Margaret "begotten, or issue of such child or children then living, *upon trust* to "pay and dispose of said [principal sums] to, for and unto all and every or "such one or more exclusively of the other of such children or child of "said James Heron by the said Margaret to be begotten, or the issue "of such child or children, in such shares" as the said James Heron should appoint, and in default of appointment share and share alike among such of the said children as should be living at the time of the decease of the said James Heron and the issue living of such child or children of the said James and Margaret as should be then dead, such issue to take the parent's share ; "and in case there [should] be no "child of the said Margaret by the said James Heron, or issue of such "child living at the death of the said James Heron, then upon trust "and to and for the only use, benefit and behoof of the said James "Heron, his heirs, executors, administrators and assigns, to his and their "own use " absolutely.

The indenture *further witnessed* "that for the consideration aforesaid "and in pursuance of the agreement aforesaid, and in consideration of "10s., &c., the said James Heron released to the trustees (then being in "their actual possession," &c.) the lands of Tullyveery and the rents, issues and profits thereof, and all his estate, &c., in the same, &c., to hold to them and the survivor and heirs and assigns of such survivor for ever, *upon trust* to and for the use of the said James Heron until the marriage, "and from and after the solemnization thereof, and from and after his "decease, *in case* the said Margaret Cowan, his intended wife [should] "then be living *without any issue by him*, then in trust to the end that "the said Margaret and her assigns [should and might] immediately "thereupon out of the said lands of Tullyveery [thereby] granted and "released, and every or any part thereof, have, receive and take for and "during the term of her natural life *for her jointure and in bar of all "dower, thirds and customary and widow's part, which she, the said "Margaret might have or claim in or out of any part of the real estates "which the said James Heron now is, or hereafter shall be, seized of at "any time during the said intended coverture, the annual rent or yearly "sum of £50 sterling,*" to be payable half yearly without deduction, on every 1st of May and 1st of November, and to commence on whichever of those days should happen first after the death of the said James Heron ; and subject to such annuity, to the use of the said James Heron, his heirs and assigns for ever ; "*but in case* there [should] be issue of "the said intended marriage living at the death of the said James Heron, "*then* as to the said lands of Tullyveery, freed and discharged of said "intended rent-charge, to the use of the said James Heron, his heirs

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"and assigns for ever." Provided, that in the event of the said annuity or yearly rent-charge becoming payable, there should be the usual power to the widow and her assigns to distrain in case of non-payment. *Provided also*, and declared to be the true intent and meaning of the parties, that it should and might be lawful for the said James Heron, his heirs and assigns, notwithstanding the settlement thereby made, at all times thereafter, *without the consent or concurrence of the trustees* or the survivor of them, &c., or of the said Margaret Cowan or her assigns, by indenture to demise or lease all or any part of the said lands of Tullyveery for any term or terms, in possession or reversion, and for such rent or rents as the said James Heron, his heirs or assigns, might think proper.

Then followed a several covenant by the said James Heron and Margaret Cowan respectively to and with the trustees, &c., for further assurance upon request for the purposes of the trusts; after which the settlement concluded with the following declaration:—"And lastly, it is hereby declared and agreed by and between all the said parties to these presents that the settlement hereby made, or intended to be made, is for and in the name and in the nature of a jointure for the said Margaret Cowan, and in lieu, recompense, satisfaction and bar of all such dower and thirds at the common law or by custom, or otherwise which she may or otherwise might have, claim, challenge or demand of, in, to, or out of any messuages, lands, tenements or hereditaments which he the said James Heron is or shall or may be seized or possessed of, interested in, or entitled unto, for any estate of inheritance during the said intended coverture."

The minors in this matter were issue of the marriage of the said James Heron and Margaret Heron, otherwise Cowan, and by an order, bearing date the 20th of January 1841 (the said James Heron, the minor's father, being then dead), it was referred to the Master to inquire and report as to the respective ages and fortunes of the minors, and what would be a proper allowance for their maintenance and education respectively, and to appoint guardians, &c. On the 29th of May 1841, the Master reported, amongst other things, that the minors were of the respective ages of five years, three years and two years; that James Heron, their father, died intestate on the 23rd of March 1839, leaving them and their mother Margaret Heron, otherwise Cowan, his widow, him surviving; that the minors were entitled (with other property left to them by relatives of their father), share and share alike, to £700 of the late currency, part of the property of their said mother assigned to the trustees upon the trusts of the said settlement of 23rd of December 1833; that the lands of Tullyveery were held by James Heron deceased in fee-farm, and, after deducting the head-rent and tithe-rent-charge, gave a net annual income of £207. 13s. 6d.; that the minors' mother was entitled to dower or thirds, being the annual sum of £69. 4s. 6d., out of the

said lands of Tullyveery for her life; and, subject thereto, that the minor James Heron was entitled to the said lands, and that the net annual income thereof to which he was entitled during the life of his mother, was the annual sum of £138. 9s. The report further found that £10 per annum would be a proper allowance for the maintenance of each of the minors, Jane and Margaret, and that £100 a year would be a proper allowance for the maintenance of the minor James.

The Master's finding as to the dower having been objected to, an application was now made on the part of Robert Heron, one of the paternal uncles of the minors, that the report should be sent back to be reviewed and varied, "inasmuch as the said Master has found that the "said Margaret Heron, mother of the minors, is entitled to dower or "thirds, out of the said lands of Tullyveery, whereas he ought to have "found that she was barred of such dower or thirds by the express terms "of the settlement, entered into before, and in contemplation of her marriage, bearing date the 27th of December 1833, at which time she was "of the full age of twenty-one years."

Mr. *Wm. Brooke*, Q. C., and Mr. *Nelson*, for the motion.—When Mrs. Heron executed the settlement of 27th December 1833, she was of the full age of twenty-one years, competent to make and enter into a valid contract, and her friends were about her. She was herself seized of a freehold estate, out of which a certain provision for her life was secured to her, from and immediately after the death of her intended husband, in case she should survive him; it being thereby declared that upon the death of the said James Heron, the estate should revert to the uses set forth in the will of Samuel Cowan—in other words, to the sole and separate use of Mrs. Heron, for her life. Besides this certain provision for her life, a contingent annuity was charged for her upon her intended husband's estate, to be payable from and immediately after his decease, in the event of his dying without issue of the marriage; but whether it should become payable or not, the agreement and intention of the parties clearly was, that the utmost confidence should be reposed in the intended husband, and that the dower should be barred. The settlement is expressly in bar of dower, and the concluding clause leaves no doubt as to the intention of the parties. An adult and single woman may bind herself by contract just as a man may, and although it is sometimes said in the books that "the law favours dower," no authority can be cited for the proposition, that an adult female may not before marriage, bind, limit, or waive her right of dower, by contract, especially when, as in the present case, a certain provision to take effect from the death of the husband, and to continue during the life of the widow, is secured.

The case of *Power v. Shiel* (a) will no doubt be cited on the other

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(a) 1 Mol. 296, 312.

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side. The decision of Lord Chancellor Hart, in that case, is no more than that where a woman, before marriage, contracts for an annuity in lieu of dower, the annuity must be forthcoming; and if it be not, she will be entitled to dower *to the extent of the provision intended*; but the *dicta* go very much further than the point of decision, and are confessedly at variance with the opinions of three eminent Judges—Lord Alvanley, in *Carruthers v. Carruthers* (a), Lord Redesdale, in *Birmingham v. Kirwan* (b), and Sir John Leach, in *Simpson v. Gutteridge* (c)—which appear to be more accordant with general principles than the *dicta* of Sir Anthony Hart, for which no authority whatever is cited, either by him or by Mr. Warren, who argued on the side supported by the decision. In *Vernon's Case*, 1st *resol.* (d), Lord Coke states and illustrates the reason why a collateral satisfaction could not bar dower at common law, and that reason was *not* “the peculiar character of the provision and consideration of the circumstances of the party,” as suggested by Sir Anthony Hart, but because dower is a freehold estate, and, therefore, the right to it could not be barred by any collateral satisfaction; and Lord Coke goes on to say, that “dower *ad ostium ecclesie*, or *ex assensu patris*”—which might be indefinitely less than a third—“concluded her of her dower”—that is, if she thought proper to accept it; for she was at liberty to refuse it, in which case she should have her dower at common law: *Co. Lit.* 46, a, b. All this is not only consistent with, but distinctly recognises the principles on which this Court acts in cases of contract, and seems fully to warrant the opinions expressed by Lord Alvanley, Lord Redesdale, and Sir John Leach. The distinction between the cases of a female infant and a woman of full age entering into a contract in consideration of marriage, seems to be so obvious in principle as to require little observation; and it is a distinction taken in *Caruthers v. Caruthers*, and adopted in *Simpson v. Gutteridge*; and the *dictum* of Sir Anthony Hart, as to the law having marked a distinction between the right of dower and other rights, does not seem to be supported either by authority or reason, and is directly at variance with the deliberate opinion of Lord Redesdale in the case already referred to.

Mr. Warren, Q. C., and Mr. Mccredy, for Mrs. Heron.—Three different classes of property are included in the settlement: Mrs. Heron's freehold estate, her money, and her husband's freehold. As to the first, it was agreed that it should be settled to the use of the husband for his life *during the coverture*, although the conveyance is to the use of the husband for his natural life. The settlement as to the lady's money is remarkable: the £700 was to be to the use of the intended husband

(a) 4 Bro. C. C. 513.

(b) 2 Sch. and Lef., 450, 451.

(c) 1 Mad. 609.

(d) Co. 1.

for life, and upon his death it was to go to the issue of the marriage, according to his appointment, or in default of such appointment share and share alike; and in case of no issue of the marriage, it was to be the husband's absolutely. In no event was Mrs. Heron to be entitled to any part of it. Then as to the husband's fee-farm, it was agreed that it should be charged with an annuity by way of jointure for Mrs. Heron, in the event of the husband dying without issue of the marriage; but in case of issue, it was not to be liable to the annuity.

Upon this settlement two questions arise: first, whether it was the intention of the parties that in the event of the annuity not being payable, the widow should be barred of dower? and secondly, whether (supposing such intention) this Court would become active in giving effect to it? The intention to bar dower must be clearly expressed: *Tinny v. Tinny* (a); but in the present case, although the settlement recites at length the agreement of the parties, it certainly does not clearly appear from this part of the deed, that it was agreed or intended that the dower should be barred in any other event than that upon which the annuity should become payable. We submit that the intention was, that if the wife survived without issue, she should have the annuity and be barred of dower; but in the event of her surviving with issue she should have the dower instead of the annuity—the dower being some £18 or £20 a-year more than the annuity. As to the provision for Mrs. Heron out of her own freehold estate, it is very insufficient for her support; and besides, it does not move from the husband, and must therefore be put out of the case. The intention which we would suggest, would, as we conceive, be rational and just, but the supposition on the other side—that it was the intention that the widow, in the event of her being left childless should have an annuity; but in the event of her being left with a large family, she should neither have the annuity nor any thing in lieu of it—seems not to be consistent with either usage or reason. At any rate, such intention is not clearly expressed in this statement of the agreement of the parties, and the uncertainty in this part of the deed extends to the concluding clause of it also. If there be any doubt of the intention, the Court will presume it to have been consistent with legal rights.

But supposing it to be indisputably clear upon the face of the instrument, that the intention of the parties was as alleged on the other side, the judgment and decision of Sir Anthony Hart, in *Power v. Sheil* (b), are precise authorities for the propositions that it is not competent to a woman to contract that her right of dower shall be barred for a mere contingency, and that the ordinary principles of contract do not apply to such a case. The cases of *Caruthers v. Caruthers* (c) and *Simpson v. Gutteridge* (d) are clearly distinguishable from the present. Here, ac-

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(a) 3 Atk. 8.

(b) 1 Mol. 296.

(c) 4 Bro. C. C. 513.

(d) 1 Mad. 609.

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According to the supposed contract, the lady's money has been taken from her and she is to be barred of dower and not to have any provision in lieu of it, because it has happened that she has been left a widow with three infant children. It is a mistake to say that the passages in the judgment of Sir Anthony Hart which have been referred to by the Counsel on the other side are mere *dicta* for which no authority can be cited: the precise points may not have previously arisen for decision, but there is scarcely a proposition more frequently repeated in the books than that "the law favours dower." Lord Bacon says there are three things which the law of England especially regards, and those three things are—*life, liberty, and dower*. At common law, dower could not be barred by any provision instead of it; *Com. Dig.* tit. *Dower, E*. If, in the present case, the widow brought her writ of dower, there could be no defence to it; and we submit that this Court, if called on to restrain her from proceeding at law, would refuse to do so, inasmuch as there is here neither a legal nor equitable jointure provided in lieu of dower, and the contract sought to be enforced, is unreasonable and repugnant to the spirit with which the right of dower is regarded by the common law.

June 15.

MASTER OF THE ROLLS.

[After stating the application in this case, and the contents of the marriage settlement above set forth, and having observed upon the absence of any limitation of the husband's estate to the issue of the marriage, and upon the reservation of a leasing power, by the exercise of which the charge of the annuity might have been defeated, his Honor proceeded to deliver his judgment to the following effect] :—

It is plain upon the face of this instrument that the utmost confidence was to be reposed in the intended husband, and I cannot entertain any doubt as to the intention or contract of the parties. The contract plainly was, that in any event the right of dower should be barred; that the lady's freehold estate, producing it seems about £90 a-year, should be secured to her in the event of her surviving her husband; that her money, amounting to £700, should, in the event of there being children of the marriage, go to such children according to the husband's appointment, or share and share alike in default of such appointment; but, in case there should be no children, that the £700 should go to the husband and his representatives absolutely; and in such case, that the lady should have as an equivalent an annuity of £50 for her life charged upon the estate of her husband. Such being, as I conceive, the plain intention and contract of the parties, it remains to be considered whether Mrs. Heron should now be bound by it.

As I think it cannot be said that the contract is unreasonable, the proposed question at once resolves itself to whether it was competent for Mrs. Heron, before marriage, she being an adult and not under disability,

by an equitable contract to bar her dower, without any certain provision in lieu of it being secured to her out of her husband's estate.

In general, an adult woman, not under disability of coverture or otherwise, is, in contemplation of law, as competent a contracting party, and as much bound by contract as any other person: she may deal with her rights just as others may, and having done so, the contract binds her. Therefore, the simple question in this case is, whether this Court should regard a woman's right of dower as being different from and to be more protected than her other rights.

In the case of *Power v. Shiel* (a), Sir Anthony Hart is reported to have said that the law has certainly seen and marked very clearly a distinction between the right of dower and other rights, and that the right of dower is to be more protected. For this position, however, no particular decision or authority is referred to, and it is confessedly at variance with the opinion of Lord Redesdale, as reported in *Birmingham v. Kirwan* (b). In my opinion there is no reason for any such distinction. There can be no doubt that an adult woman not under disability may, by contract, waive or bar rights quite as valuable and important to her as the right of dower could be; and I cannot understand why equity should hold her contract in bar of dower more loosely, or regard it as entitled to any more favour or protection than her other contracts. It has been said in some of the text books that the law favours dower; and life, liberty, and dower, have been classed together as if they were equally sacred in the eye of the law; but such statements do not seem to me to be warranted by authority or reason. The law favours every right, to the extent of giving it due protection and support, but it does not extend more favour to one right than to another. If, in the objectionable sense, the law favours dower, so that equity ought not to tolerate or give effect to the contract of an adult female in bar of her sacred right, though she was under no disability or control at the time, and entered into it for valuable consideration and of her own free will; if this be so, why will the law give effect to a fine levied by a *feme covert* after her right has vested, and when she is under partial control?

In *Caruthers v. Caruthers* (c), Lord Alvanley decided that a female infant cannot be barred of dower by a contingent provision; but he said—"I do not say that if she had been an adult she might not have bound herself. She might have taken a provision out of the personal estate, or she might even have taken a *chance* in satisfaction of her dower, acting with her eyes open. But an infant is not barred by a precarious interest." In the last edition of Sir Edward Sugden's work on *the Law of Vendors and Purchasers* (d), it is stated that "Equity appears to

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(a) 1 Mol. 312, a.

(b) 2 Sch. & Lef. 447.

(c) 4 Bro. C. C. 513.

(d) 3 vol. p. 219.

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"consider any provision, however inadequate or precarious it may be, "which an adult previously to marriage accepts in lieu of dower, a good "equitable jointure;" and, as fully sustaining this position, the passage in Lord Alvanley's judgment already referred to, and also the case of *Williams v. Chitty (a)*, and some others are cited.

In *Power v. Shiel*, though it was said that the contract before marriage did not bar the right of dower, yet, as has been observed on the discussion of the present motion, the doctrine so stated is essentially qualified by the decision: for the decision was not that the contract was inoperative, and that the widow was entitled to insist upon her full right of dower, but that as the contract was for an annuity of £150 in lieu and bar of dower, this Court would take care that the widow should not be barred of her dower without getting what she contracted for in lieu of it, and that as the consideration for which she agreed to waive her legal right was not forthcoming, she should be permitted to proceed at law as for her dower to the extent of the annuity, in consideration of which she agreed that the dower should be barred. Apart from mere verbal refinement, I can see in this decision nothing else than the application of the very principles, the applicability of which to such a case, previously seemed to have been doubted.

Corbet v. Corbet (b) is an exceedingly strong case for the purpose of shewing the grounds upon which a Court of Equity proceeds, and the length to which it will go, in giving effect to an equitable contract in bar of dower. The contract in that case was entered into by an infant before marriage, her father being an assenting party to it. It was that the right of dower should be barred in consideration of an annuity of £100 for the lady, secured by her intended husband for her life, in the event of her surviving him. The settlement in pursuance of this agreement purported to contain a grant to trustees for the lady, of a rent-charge of £100, charged on certain lands, of which the husband was tenant for life (with remainder to his first and other sons in tail, remainder over), but with power upon certain terms, and subject to certain conditions, of charging them by way of jointure. The grant of the rent-charge, not being a due execution of the power, was void; and in some years after the marriage, the defect having been discovered, it was sought to cure it by the co-operation of the tenant for life and the party entitled next in remainder, in default of issue male of the tenant for life. This subsequent settlement was not only liable to the objection that it was during the coverture, but also, that it should at any time have been defeated by the birth of a son of the tenant for life, and at no time either before or during the whole term of the coverture could the annuity in lieu of dower be said to

(a) 3 Ves. 545.

(b) 1 Sim. & Stu. 612, affirmed on appeal by Lord Lyndhurst, C., 5 Russ. 254.

have been secured. But, ultimately, the tenant for life having died without issue male, and the post-nuptial settlement being set up, and the annuity for the widow thereby secured, the Court held that notwithstanding the original defect of the grant in lieu of dower, yet, as in fact, the widow got what she contracted for, her right of dower was barred. In *Williams v. Chitty* (a), also, the widow claiming dower had been an infant at the time of the execution of the settlement; and although her guardian was no party to it, and the subject matter of it was partly the property of the husband and partly of the wife, and from its nature could not be said to afford a secure provision for the life of the widow; yet, as the contract appeared reasonable, and the widow got that which she had contracted for, the Lord Chancellor thought it so clear that the right of dower was barred by the contract, that he deemed it unnecessary to hear Counsel in opposition to the claim.

In the present case it may be said that there is no provision in lieu of dower moving from the husband, and that this case, therefore, goes a step further than any of those which have been mentioned. But where I find it laid down by very high authority, as in the passage already quoted from Sir Edward Sugden's work, that the question arising upon the contract of an adult female before marriage, whether or not there is by such contract a good equitable bar of dower, is irrespective of the consideration of the nature or adequacy of the substituted provision; and that even in the case of an infant, as in *Williams v. Chitty*, it was held to be a good equitable jointure although moving only in part from the husband, and as it would seem, mainly out of the wife's property,—or, as in *Corbet v. Corbet*, that the widow will be bound by her contract although an infant when she entered into it, and the grant thereby accepted by her in lieu and bar of dower was originally void—and that in all such cases, the contract being reasonable, equity only looks to its fulfilment, and to see that the widow gets that which she contracted for, I think that the fact already adverted to, that in the present case there is by the contract no provision moving from the husband, can make no difference. If such a distinction should prevail, consequences the most absurd and inconvenient might follow, whenever the lady's estate might happen to be very large and that of the intended husband comparatively small: it seems to me not to be warranted by authority or reason.

It is, perhaps, worthy of remark, that if Mrs. Heron's marriage settlement, instead of being executed on the 27th of December 1833, had been on any day after the 1st of January 1834, the late Dower Act, 3 & 4 W. 4, c. 105, would have applied conclusively to this case. I am aware that the policy of that statute has been doubted by very high authority, and how far I should be disposed to agree with the strictures

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which have been made upon it, it is of course unnecessary for me to say. But looking at this case, as indeed it must be looked at, as one altogether independent of the late act, and to be governed by those principles which Courts of Equity have applied in like cases; and considering how mainly the settlement and security of property depends on the binding strength of contract, and that the disallowance of, or refusal by a Court of Equity to execute such a contract as that in the present case should probably have the most injurious effect upon the interests of married women, I think I am bound to hold that there is in this case a good equitable jointure in bar of dower, and that I cannot adopt the Master's finding upon that subject. However, as the Master, having found in favour of Mrs. Heron's claim of dower, has further reported that £100 per annum would be a proper allowance for the maintenance of the infant James Heron, and as I am obliged to dissent from the Master's opinion on the dower question, I shall by my order increase the allowance for the maintenance of the male infant from £100 to £150 per annum (a).

Exceptions allowed.

(a) See *Allen v. Coster*, 1 Beav. 202.

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Equity Each.

IRONS . . . *Petitioner ;*
DOUGLAS . . . *Respondent.*

6 & 7 W. 4, c. 99, s. 3.

(*Equity Exchequer.*)

May 29.
June 5.

PREVIOUS to the 10th of February 1792, the then Bishop of Derry being seized in fee in right of his Bishoprick, of "all that Territory or "Precinct of land called the Termon or Erenagh lands of Bovenagh, being "the denominations of Ardenariff and Bovenagh," demised them to John Spotswood, his executors, administrators and assigns, for the term of twenty-one years; "Excepting and always reserving out of this demise all "gorts and glebes, and all timber trees, with free liberty to fell, work and "carry away the same, other than such timber and trees as shall be set "out by the Bishop's agents or officers for the time, for buildings or "other reparations on the premises; and all aviaries of hawks, with

The Bishop of D. being seized in fee in right of his Bishoprick, demised to J. S. for the term of 21 years, "All "that territo- "ry of land "called B., "except all "royalties, "mines, min- "erals, quar- "ries and tur- "baries; with

"liberty to dig, cut, save and carry away the same: Provided always that J. S. and "his under-tenants actually residing on the premises shall, notwithstanding the reser- "vation or exception of turbaries, be permitted to cut, save and take as much turf each "year during the demise, as may be sufficient for their firing, to be burned or consumed "on the premises; but J. S., his executors, administrators or assigns, and his and their "under-tenants, shall not by this proviso have any right to cut or save turf for their "firing in other parts of the excepted turbaries, but such as shall from time to time be "marked out for them by the Bishop of D."

J. S. afterwards demised part of the lands so demised to him, to J. I. for the term of 21 years, with a *toties quoties* covenant for a renewal, by the description of "All that "farm in B. which he purchased from R. B., and then in his possession; excepting and "always reserving out of this demise all royalties of what nature or kind soever, as the "same are and may be excepted from time to time by the Bishop of D. and his successors "from J. S., his heirs and assigns."

When this demise was made, J. I. was in possession of a portion of bog, as part of the farm of B. which he had purchased from R. B.

The estate of J. S. vested in J. D., who in the year 1835 acquired the inheritance in the lands under the provisions of the 3 & 4 W. 4, c. 37. By the conveyance of the fee, the Bishop of D. granted to him the lands as described in the lease to J. S., together with "all royalties, mines, minerals, bogs, mosses and turbaries." The estate of J. I. vested in his sons W. I. and J. I.

W. I. and J. I. having presented a petition for a conveyance of the inheritance in the lands demised to J. I., it appeared by the report of the Remembrancer that during the last fifteen years J. D. had used to give permission to his tenants, occupying other portions of the demised lands, liberty to cut turf for their own consumption on the portion of bog in the possession of W. I. and J. I.; and that the said under-tenants had cut turf accordingly, without any hindrance by W. I. and J. I. or the Bishop of D.: and that W. I. and J. I. and those from whom they derived, had at all times cut turf for their own consumption, and had given permission to such persons as they thought proper to cut turf on the bog in their possession, without any hindrance by the Bishop of D., J. S., or J. D.

Held—1st. That the soil of the bog in the possession of J. I. at the time when the lease was made to him, passed to him under that demise.

2ndly. That the petitioners were entitled to a conveyance of the inheritance in the premises demised by the lease to J. I.; and that there ought not to be therein inserted a covenant that it should be lawful for J. D., his heirs or assigns, to direct any person residing on the territory of land called B., who had no bog within his holding, to resort to the bog in the possession of W. I. and J. I. for the purpose of cutting turf thereon; and that the persons so directed might cut and carry away such quantity of turf each year as might be necessary for their own consumption, without any hindrance by W. I. or J. I., their heirs or assigns.

In the conveyance to the petitioners, the same general words were made use of as were contained in the conveyance from the Bishop of D. to the respondent.

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"liberty for the said Lord Bishop and his successors, and his and their
 "servants, to hunt, hawk and fowl on the premises; and liberty to hold
 "any Court or Courts on the premises. And also except all royalties,
 "mines, minerals, quarries and turbaries; with liberty to dig, cut, save,
 "and carry away the same; and to use, take and distrain for all and
 "singular the royalties, reservations, payments and profits out of this
 "demise. Provided always, that the said John Spotswood and his under-
 "tenants actually residing on the premises or any part thereof, shall,
 "notwithstanding the above reservations or exceptions of turbaries, be per-
 "mitted to cut, save and take as much turf each year during the continu-
 "ance of this demise as may be sufficient for their own firing, to be burned
 "and consumed only on the premises: but he, the said John Spotswood,
 "his executors, administrators or assigns, and his and their under-tenants,
 "shall not by this proviso have any right to cut or save turf for their
 "firing in other parts of the said excepted turbaries, but such as shall from
 "time to time be marked out for them by the said Lord Bishop of Derry,
 "or his successors, or such persons as he or they shall appoint from time
 "to time to mark and set out the same."

By indenture of the 10th of January 1792, John Spotswood demised unto John Irons, his executors, administrators and assigns, "All that farm
 "in Boygh, which he purchased from R. Bennett, and then in his
 "possession, being one-half of that part of Boygh called Ballagh's Hill,
 "with all the rights, members, and appurtenances thereunto belonging,
 "or in anywise appertaining" (which premises were and are part of the
 lands of Ardenariff aforesaid), for the term of twenty-one years, with a
toties quoties covenant for renewal, at the yearly rent of £2. 3s. 3d.,
 and renewal fine of £2. 3s. 9d. This lease contained the following ex-
 ception:—"Excepting and always reserving out of this demise all timber
 "and timber trees, wood and underwood, timber under ground, and all
 "royalties of what nature or kind soever, as the same are and may be
 "excepted from time to time by the then Bishop of Derry and his
 "successors from the said John Spotswood, his heirs and assigns."

The premises demised to J. Spotswood consisted of about 2600 acres of land; of which about 1000 acres were mountain, covered with turbary, and the residue arable and pasture land. The premises demised to J. Irons consisted at the present time of about 28 acres of arable and pasture land, and 50 acres of mountain covered with turbary: but it was alleged by the petitioners, that in 1792 the quantity of the arable and pasture lands was much less; and that it had been since increased by reclaiming some parts of the mountain, where the turbary had been cut out.

In the year 1818, J. Spotswood assigned his interest in the lease from the Bishop to the respondent James Douglas: and the interest of J. Irons in the lease of 1792, upon his death in 1810, vested in his

sons, the petitioners, William and Jacob Irons. Both the head-lease and the sub-lease were regularly renewed every year; and in both, the same exceptions and reservations were inserted as were contained in the original leases respectively.

In 1835, James Douglas, pursuant to the provisions of the 3 & 4 W. 4, c. 37, notified to the Ecclesiastical Commissioners for Ireland and also to the Bishop of Derry, that he was ready and willing to purchase the fee-simple and inheritance of and in the lands and premises demised by the head-lease; and the terms having been agreed to, by indenture of the 1st of June, made between the Bishop of Derry of the first part, the Ecclesiastical Commissioners for Ireland of the second part, and James Douglas of the third part, the Bishop of Derry, pursuant to and by virtue of the said act, and in consideration of the sum of £1080. 5s. 4d. paid by J. Douglas into the Bank of Ireland to the credit of the Ecclesiastical Commissioners, and of the yearly rent of £106. 12s. 4½d., granted and released to James Douglas and his heirs, "all that and those, that "territory or precinct of land called the Termon or Erenagh lands of "Bovenagh, containing by estimation half a quarter of land or two "ballyboes, commonly called or known by the names of Ardenariff and "Bovenagh, and situate in the Barony of Kennaught and county of "Londonderry; with all houses, outhouses, buildings, gardens, yards, "orchards, ways, paths, passages, waters, watercourses, royalties, mines, "minerals, trees, woods, underwoods, commons, commonable rights, "hedges, ditches, fences, mounds, bogs, mosses, turbaries, privileges, profits, "commodities, advantages, easements and appurtenances whatsoever, to the "said lands and premises thereby conveyed, or to any of them, or to any "part thereof, respectively belonging or in anywise appertaining, or with "the same, or any part thereof, then or at any time heretofore usually "held, occupied or enjoyed, or accepted, reputed, deemed, taken and "known as part, parcel, or member thereof, or of any of them respectively; and the reversion and reversions, remainder and remainders, "yearly and other the rents, issues and profits thereof, with their and "every of their appurtenances; and all the estate, right, title, interest, use, "trust, inheritance, property, possession, claim and demand whatsoever, "at law or in equity, or otherwise howsoever, of him the said Bishop of "Derry of, in, to, or out of, or upon the said lands, tenements and premises, with their and every of their appurtenances. To hold the said "lands, tenements and premises, and all other the premises thereby released and conveyed, or intended so to be, with their and every of "their appurtenances, to the said James Douglas, his heirs and assigns for "ever, in as full, large, ample and beneficial a manner as the said Bishop "of Derry had, or might or could have, power or authority to grant, "release or convey the same, under or by virtue of the said act of Parliament:" subject to the rents and covenants in said indenture mentioned.

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Shortly after the execution of this conveyance, J. Douglas called upon the petitioners and his other under-tenants, having *toties quoties* covenants for renewal, to contribute to the purchase-money paid by him to the Ecclesiastical Commissioners, in proportion to the value of their interest in the said lands and premises; the parties, however, could not agree upon the amount; for the respondent insisted that as the conveyance in fee to him did not contain any exception of the turbaries, &c., he was entitled not merely to the turbaries upon the petitioners' farm and those of the other tenants on the lands, but also to the ground and soil of all the bogs and mosses therein: on the other hand, the petitioners insisted that they were entitled to have the renewals of the lease of 1792 executed to them without the exceptions contained in that lease being inserted therein. There were also disputes between the parties as to whether the sub-tenants should contribute to the costs of the conveyance of the fee to the respondent; and also as to certain credits which the petitioners claimed for over-payments on account of renewal fines. In consequence of this disagreement, the respondent in February 1836 filed a petition in the Equity Exchequer, and obtained an order referring it to the Remembrancer to inquire and report the sums of money to be paid and contributed by the present petitioners, and the other tenants of the lands, as and for a contribution towards the purchase-money paid by said James Douglas, or towards reimbursing him a portion of the sums of money paid by him in respect of the purchase of said lands, according to the value of their respective interests in the said lands. Under this order of reference J. Douglas filed a charge, in which he calculated the amount of the sum to be contributed by the petitioners upon the principle that he was entitled to the bogs, mosses and turbaries comprised in and granted by the conveyance in fee; and he claimed contribution not only towards payment of the purchase-money, but also for interest thereon, and for the costs of the conveyance. The discharge of the present petitioners and of the other under-tenants contested the right of J. Douglas to contribution for the interest and costs; and claimed that they were respectively entitled to the bogs, mosses and turbaries lying within their several holdings; and admitted that they were liable to contribute in respect of the value thereof. The Remembrancer having decided that the under-tenants were not liable to contribute to the interest or costs, intimated his intention of reporting specially as to the principal question; and gave directions to have a report prepared accordingly, finding that if the Court should be of opinion that the petitioners were entitled to the bogs, mosses, turbaries, and all other appurtenances situate and lying within that portion of the lands conveyed in fee to the respondent, which was in their possession; the sum which they were bound to contribute was £27. 18s. 0½d.; but if the Court should be of opinion that J. Douglas, and not the under-tenants, was entitled to said bogs, mosses, turbaries, and appurtenances, that in such case the sum which they were bound to

contribute was only £26. 1s. 11½d. Before the report was made up, the 6 & 7 W. 4, c. 99, was passed; and thereupon, on the 15th of November 1836, the petitioners served a notice upon the respondent, stating that as they were under that act entitled to a conveyance in fee of the lands held by them under the respondent, and as they were anxious to avoid unnecessary expense and delay, and were ready to pay their contribution to the purchase-money paid by the respondent and all rent and fines due by them, upon his executing to them such conveyance in fee-simple; they thereby undertook to pay to the respondent the contribution to such purchase-money admitted by them as their proportion in their discharge, upon his executing to them a conveyance of the fee-simple and inheritance of their lands, in the words of the grant from the Bishop and Ecclesiastical Commissioners to him. In reply to this, the respondent stated that he was ready to execute to them a conveyance of a perpetual estate and interest in the lands they held under him in the words of and in strict conformity with their lease, upon paying to him as and for their contribution to his purchase-money the sum mentioned in his charge as payable by them (and in which sum no contribution was charged for or in respect of the bogs, mosses and turbaries), together with all rents and fines due by them. Some further notices passed between the parties for the purpose of ascertaining the precise amount of the rent, which the respondent required to be reserved upon the conveyance in fee to the petitioners; and on the 17th of December 1836, the petitioners tendered to the respondent the sum of £27. 18s. 0½d., being the sum reported payable by them as their contribution (if it should be held that they were entitled to the bogs, mosses and turbaries), together with all arrears of rent and fines due by them. This sum was accepted by the respondent, without prejudice to his disputing the petitioners' claim to the bogs, mosses and turbaries. On the 22nd of December the petitioners tendered to the respondent a conveyance in fee of the lands held by them, in the same words as that from the Bishop to the respondent, *mutatis mutandis*, to be executed by him. This the respondent declined to do; and thereupon the petitioners presented the present petition, praying that the respondent might be ordered to execute the conveyance so tendered; or else that it might be referred to the Remembrancer to settle and approve of a proper deed of conveyance of the fee-simple and inheritance of said lands to them.

In answer to the petition, the respondent insisted that he was not bound to convey the bogs, mosses and turbaries to the petitioners; that they were not demised by the lease of 1792, being expressly excepted therefrom, and that he was only bound to grant in fee the same premises which had been previously demised with *toties quoties* covenant for renewal: that though the petitioners were now in possession of certain

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bogs, yet they were not so originally, and that their possession must have originated in a trespass. He further stated that there were several other tenants upon the lands conveyed to him in fee, who had not any bog or turbary included within the premises demised to them; and that if he were compelled to execute a conveyance in the terms required, the consequence would be that those tenants would be wholly deprived of the right of turbary which he and J. Spotswood had granted to them upon the bogs now in the possession of the petitioners, and of other of his tenants. He also stated that he himself was possessed of a corn-mill on the lands conveyed to him, the water for which came from rivers which ran from the mountain, through the farms of many of the *toties quoties* tenants; and he submitted that if he were to grant conveyances in fee-simple of the water and water-courses appertaining to the said farms, the *toties quoties* tenants of those farms might divert the water from him.

The petition came on to be heard in Easter Term 1838, and was further argued in Michaelmas Term 1838. The question as to the construction of the Church Temporalities Acts was argued at some length; but it being objected on the part of the respondent, that the quantity of land then in the petitioners' possession, had not been demised by the lease of the 10th of February 1792,—for that by that lease the arable land only, but not the soil in the bog, was demised, with a liberty to the tenant to cut turf on the bog for his own use; and that since the demise, the tenant and those deriving under him, taking advantage of the liberty to cut turf given to them by the lease, had reclaimed much of the bog over which they were entitled to a right of turbary only, whereas they were only entitled to such land as had been in the possession of R. Bennett or of John Irons, when the lease of 1792 was made,—it was, on the 8th of November 1838, ordered by the Court that the matter of the petition do stand; and by consent, that the respondent do bring such ejectment against the petitioners as he might be advised; and that on the trial of such ejectment, the title of the respondent under the Ecclesiastical Commissioners should be admitted, and that it should be considered that the lease of the 12th of February 1792, was an existing lease; so that the question on the trial of such ejectment should be, whether the bog claimed by the petitioners' petition, or any and what part thereof, passed by the lease of the 12th of February 1792. The ejectment was tried before Pennefather, B., at the Spring Assizes 1839, for the county of Londonderry, when the jury found that the defendants were not guilty of the supposed trespasses; and that 21A. 3R. 32P. in the lower part, and 82A. 1R. 17P. of the bog, as now in their possession, passed under the lease of 1792.

On the 17th of November 1839, the matter of the petition again came on to be discussed; when it appeared that the respondent insisted that

in the conveyance to be executed to him, there should be excepted and reserved to himself and all his tenants of the lands conveyed to him by the Bishop, a right of turbary over the bogs to be conveyed to the petitioners; and also, that all royalties, waters and water-courses, should be excepted out of the conveyance. It was argued, upon his behalf, that all turbaries which had been reserved to the Bishop by the lease of 1792, were granted to him by the conveyance of the fee; and that he now, in that respect, stood precisely in the same situation as the Bishop. With respect to this line of argument, the following observations were made by—

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PENNEFATHER, B.—The Bishop reserves to himself and his successors “all turbaries:” but what is a turbary? It is a right of cutting turf in a particular place; not of cutting turf where there is no turf, nor over the whole bog. It is matter of evidence and of user, what was the right of turbary which the Bishop had. The respondent calls on the Court to say that there was a right of turbary reserved to the Bishop, over every portion of the entire bog demised to Spotswood.

There are two things now in controversy; the right to the royalties, distinguishing royalties from a right to turbary; and the right to the turbary. As to the latter, it is impossible for us now to decide it, without further information: for the respondent claims a right of turbary as derived from the Bishop; and *non constat* that there ever was a right of turbary exercised by the Bishop over this spot of bog demised to the petitioners. Therefore, there must be a reference on that subject. And to save expense, we will direct the Remembrancer to settle a draft of the deed of conveyance.

The following order was then pronounced:—

“Refer it to the Chief or Second Remembrancer to inquire and report whether the respondent is entitled for himself or under-tenants, to any and what right of turbary upon the lands and premises comprised in the lease of the 10th of February 1792, in the petition mentioned, and to what extent particularly, regard being had to the several leases and sub-leases and other deeds or instruments mentioned in the petition and answering affidavit, and to the premises comprised in the said several leases and assignments, and to the user of such alleged right of turbary from the date of the said lease of the 10th of February 1792, and regard being also had to the rest of the estate purchased from the Bishop of Derry. And the petitioners admitting that the respondent is entitled to an easement in the several water-courses in the premises comprised in the said lease of the 10th of February 1792, or adjoining thereto, and the respondent claiming a right greater than a mere ease-

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"ment in such water-courses, and insisting that such water-courses should
 "be reserved out of the conveyance to be executed to the petitioners, of
 "the premises comprised in said lease of the 10th of February 1792,
 "Let the said Chief or Second Remembrancer inquire and report the
 "rights of the respondent in respect of such water-courses and the extent
 "thereof. And let the said Chief or Second Remembrancer settle a
 "draft of a deed of conveyance, to be executed by the respondent to the
 "petitioners according to the rights of the parties, and pursuant to the
 "statute in that case made and provided. Reserve further order and
 "costs until the return of the report."

In pursuance of this order, the Second Remembrancer made his report, dated the 6th day of May 1841. By it, after stating the demise from the Bishop of Derry to John Spotswood, and the lease of the 10th of February 1792, by the latter to John Irons, as hereinbefore set out, and that on the portion of land demised by the lease of 1792, there is a bog or piece of ground covered with turbary;—he reported that during the last fifteen years, the respondent has been used to give and grant permission to certain of his tenants occupying other portions of the lands of Ardenariff, demised to him by the lease from the Bishop of Derry (in which portions so occupied by the said tenants, there was not any turbary), to enter upon the said bogs in the portion of the said lands demised to the petitioners by the indenture of the 10th of February 1792, and therein to cut and make turf for their own consumption, and to direct them so to do: and that the persons so obtaining such permission from the respondent have accordingly entered upon the said bog, and have cut and made turf for their own consumption respectively, and have continued so to do from year to year continuously, without any hindrance or interruption from the petitioners, or from the Bishop of Derry: but he further reported that he did not find that any such right to give or grant such permission, was assumed by the respondent or John Spotswood, anterior to such period. The Remembrancer further stated in his report, that the respondent had also during the said periods, given permission to his tenants upon the lands of Bovenagh and Ardenariff, respectively, not having any turbary on their holdings, to enter and cut turf upon the bogs in the holdings of divers others of his tenants upon the lands of Bovenagh and Ardenariff, in whose holdings there was turbary, other and besides the petitioners; and that such persons had accordingly entered upon and cut turf for their own consumption upon the premises held by them on the bogs upon the holdings of said other tenants, without any hindrance or molestation from them, or from the Bishop of Derry: and that the petitioners, and those from whom they derived, and also the several other tenants of the lands of Bovenagh and Ardenariff, upon whose farms there were turbaries, had from time to time, and at all times,

cut turf for their own use and consumption, and had also from time to time, and at all times, given permission to their under-tenants, cottiers, and other persons, as they thought proper, to cut turf thereon; and that they had cut turf accordingly without any interruption or disturbance from the Bishop of Derry or John Spotswood, or the respondent, down to the time of his report.

As to the water-course, the Remembrancer reported that the respondent was possessed of a water corn-mill and flax-mill, situate upon a portion of the premises demised by the lease from the Bishop; and that he and his tenants in possession of said mills, have had the right to and enjoyment of a stream of water running in a water-course to the mills, through and along divers portions of the lands held by the petitioners, and others of the respondent's tenants of the said lands and premises; and had alone hitherto used such streams as a mill-race; and that the respondent and his tenants of the mills, had from time to time, and at all times, exercised a right by themselves and their servants and workmen, of cleansing, scouring and repairing the water-course, and the banks and sides thereof; but that the respondent had no other or greater right in said water-course than as above stated.

With respect to the draft of the conveyance of the inheritance, the Remembrancer reported that the petitioners had submitted to him a draft of a deed of conveyance, and that the respondent insisted that there should be inserted therein a clause or proviso in the words following:—
 “Provided always, and it is the true intent and meaning of these presents
 “and of the parties hereto, and it is hereby covenanted and agreed upon
 “by said James Douglas, and William Irons and Jacob Irons, for themselves respectively, and for their several and respective heirs and assigns,
 “that notwithstanding the above grant of bogs, turf, mosses and turbary, it
 “shall and may be lawful for the said James Douglas, his heirs or assigns,
 “to direct any person residing in the said townland of Ardenariff, who
 “has no bog within his tenement or holding, to resort to the bogs or
 “turf mosses in the possession of said William Irons and Jacob Irons
 “for the purpose of cutting, winning or saving turf thereon; and that the
 “persons so directed by the said James Douglas, his heirs or assigns,
 “shall and may cut, win and carry away such quantity of turf each year
 “as may be necessary for their own consumption respectively, without
 “the interference, molestation, refusal or opposition of the said William
 “Irons and Jacob Irons, or either of them, their heirs or assigns, or any
 “person deriving under them, or any of them:” but that inasmuch as
 having regard to the lease from the Bishop of Derry and the annual renewals thereof, in which the exception and reservation heretofore mentioned was always contained; and to the sub-lease of the 10th of February 1792, and the renewals thereof, he did not think that the

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respondent had for himself or his under-tenants any right of turbary on the premises comprised in the lease of February 1792, and that any such right as he assumed to have over same, and as was thereinbefore stated, was exercised merely by the sufferance of the Bishop of Derry, he refused to insert such proviso in the deed of conveyance; and approved of the draft submitted to him by the petitioners.

In the draft of the deed of conveyance approved of by the Remembrancer, the description of the lands conveyed was in the same terms as those used in the lease of 1792, to which were added the same general words as were used in the conveyance of the fee from the Bishop of Derry to the respondent; "Saving and always reserving to the said James Douglas, his heirs and assigns, tenants and occupiers of the corn-mill and flax-mill of Ardenariff and Bovenagh, or either of them, the full and free use and enjoyment of the water and water-course now running along the said lands and premises hereby conveyed, with power to him and them respectively of repairing the banks of and cleansing said water-course, in as full and ample a manner as he and they respectively have hitherto used and enjoyed the same."

To this report the respondent excepted, because the Remembrancer had not inserted the above mentioned clause or proviso in the draft of the deed of conveyance.

For the petitioners,—Serjeant *Greene*, Mr. *Smith*, Q. C., and Mr. *J. Brooke*, Q. C.

For the respondent,—Mr. *Pennefather*, Q. C., Mr. *Warren*, Q. C., and Mr. *J. Shiel*.

The question so far as it depended upon the construction of the Church Temporalities Acts, was debated at length; but as the judgment of the Court did not at all proceed upon the construction to be given to those statutes, the argument is here omitted. The other arguments of Counsel are fully adverted to in the judgment of the Court. The cases referred to were *Byrne v. Hugo* (a); *Clayton v. The Duke of Newcastle* (b), and *Morse v. Faulkner* (c).

PENNEFATHER, B.

There has been a great deal of litigation between these parties with reference to the petition presented by Mr. Douglas; but as that petition has fallen to the ground, it is not necessary that we should pronounce any opinion upon the matters about which it was conversant, or make

(a) 1 Ir. Eq. Rep. 351.

(b) 2 Ca. in Ch. 112.

(c) 3 Swans. 429, n.

any rule with respect to the costs of it. We have merely to consider the question raised by the petition now before us; and in determining that, we do not find it necessary to pronounce any opinion upon the abstract point decided in *Byrne v. Hugo*. Our judgment in this case proceeds upon what, in our opinion, is the true construction of the deeds which have been executed between the parties, and of the leases from the Bishop to John Spotswood and the respondent. It appears that this petition, which was presented under the 6 & 7 W. 4, c. 99, claimed on behalf of the petitioners a right to the soil of this bog; and at the first hearing of the petition, the respondent having insisted that the soil of the bog did not pass to the petitioners, the Court, from the manner in which the lease of 1792 was worded—it being a demise of the premises as held by a former tenant thereof—was not able, without the assistance of a jury, to determine what, exactly, passed under it. The petitioners claimed the soil of the bog: the respondent insisted that the soil did not pass under the demise; we therefore were under the necessity of having that question determined by a trial at law; and accordingly an ejectment was directed to be brought, and such directions were given by the order as insured a decision of the question. The case was tried, and the jury found that the soil of the bog did pass by the lease of 1792; for they found that the bog had been occupied and enjoyed by the former tenant. So far, therefore, as that matter was in dispute, the petitioners established their right to the soil of the bog, in opposition to the case made by the respondent. The petition then came on to be heard a second time; and the Court were prepared to make an order directing a conveyance to be executed pursuant to the finding of the jury; when it was insisted, on behalf of Mr. Douglas, that although the soil of the bog passed from Mr. Spotswood to John Irons by the demise of 1792, and therefore, was to be considered vested in the petitioners, yet that nevertheless he, Mr. Douglas, had a right of turbary over the premises. We therefore referred it to the Remembrancer, after declaring that the petitioners were entitled to a conveyance of the premises, to settle the draft of the deed of conveyance, having regard to the instruments which had been executed in relation to the premises; and a particular clause was inserted in the order in relation to the water-course, containing the precise admission which the petitioners made as to the right of Mr. Douglas thereto, and stating how much more Mr. Douglas insisted he was entitled to; and the costs of all parties were by the order reserved. The parties then went before the Remembrancer, and the draft of the conveyance is settled in the manner in which the petitioners said that it ought to be prepared. So far as this right of turbary is concerned, the Remembrancer has been of opinion that the clause insisted on by the respondent ought not to be inserted in the conveyance; and he made his report accordingly. To

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that report, an exception has been taken by the respondent ; and now let us see what it is that the respondent demands. By the terms of the original lease from the Bishop of Derry to Mr. Spotswood, there is a general reservation of a right of turbary to the Bishop and his successors ; and there is an express clause, engrafted upon that reservation, that Mr. Spotswood should have for himself and for all his under-tenants of the lands demised, a right of turbary on the premises,—to cut turf for their own consumption. The effect of that is, that a right of turbary passed to Spotswood from the Bishop, for himself and all his under-tenants, for the use of and consumption on their premises ; and something *ultra* that right of turbary was reserved to the Bishop and his successors. What that was, no person has been able to point out ; it never was exercised or claimed by the Bishop or his successors ; nor does it appear to me that any thing in substance was in point of fact reserved to the Bishop beyond that which was given to the tenant. Mr. Spotswood being then so entitled, and having those rights for himself and his under-tenants, grants a lease to the ancestor of the petitioners of a portion of the bog, over which this general right of turbary extended. He made that grant without making any reservation to himself of this right of turbary, or of any right of turbary whatever. The effect of that is, that under the lease of 1792, Irons took the bog, discharged of any right of turbary in Mr. Spotswood or his under-tenants. That is the plain meaning and interpretation of the lease of 1792. No man can claim, against his own grant, a right to be exercised over the subject matter of that grant. Then consider what was claimed of the respondent before the Remembrancer : Mr. Douglas claims, by his exception, that very right of turbary for himself and his under-tenants, which had been granted to Mr. Spotswood by the lease from the Bishop and from which he discharged this particular portion of the lands, which he demised to John Irons. He does not claim any right of turbary reserved to the Bishop *ultra* that right ; but he claims that very thing which the Bishop had granted to Mr. Spotswood, and from which Mr. Spotswood had discharged that portion of the premises granted by him to John Irons. That is the situation of the parties. When that was stated, and the able Counsel for the respondent became apprised, exactly, of what their client had done, they admitted that the exception must be overruled ;—that he could not claim in derogation of his own act ; and that having granted the land to John Irons, without reservation, he could not say that he was entitled to a right of turbary over this portion of the land. We might say that enough was conceded by that admission for the determination of the question now before us ; namely, the disposal of the exception : but we were desirous of ascertaining if we could, what was it that Mr. Douglas could claim ; and after having taken out of

the general right of turbary, a right for Mr. Douglas and all his under-tenants to cut turf for consumption, the Counsel for the respondent could not tell the Court with any distinctness, what it was, *ultra* that, to which the Bishop was entitled. They claimed for the respondent, but in another way, the very thing which the Bishop had granted to Mr. Spotswood, and which the latter had granted to John Irons;—for they said, although we cannot claim it under that reservation, yet the Bishop having a general right to the turbary, might grant a right of turbary to Mr. Spotswood for himself and all his under-tenants:—that very thing which Mr. Spotswood had parted with to John Irons. That is an argument which cannot be pressed on the Court. It is very unlike a power given to A. to charge an estate with £1000, and another power to B. to charge the estate with another £1000; and that by a release of the one, the other was not barred. The person taking the land subject to such powers, knew what he was taking; and that the release of the one would not discharge the other. But when a man takes land discharged of the rights of A. and all his under-tenants to cut turf thereon, it cannot be considered that although he takes it discharged in one sense, yet that he takes it charged with the same right of turbary by some other person. I, therefore, think it is impossible to hold that there is any right of turbary reserved to Mr. Douglas, which he can now exercise upon these lands, contrary to the express grant made of them by the lease of 1792.

The covenant for renewal expressly points to this, that the tenants were at all times to hold the lands in as full and ample a manner as Mr. Spotswood, or those deriving under him, held them; and that no further conditions or burthens were to be imposed on them. That is our view of the case, founded upon a consideration of the acts of the parties, and the construction of the several instruments executed by the Bishop, Mr. Spotswood, and John Irons. The consequence is that the exception taken by Mr. Douglas must be overruled. And we do not think that justice calls upon us to refer this matter again to the Officer, or suffer this party again to try his hand, by setting up any other easement in the way of turbary. No other right which he could claim has been pointed out to us with any distinctness; and he has had full opportunity of submitting his case to the Court.

Then, as to the costs of this matter. The petition was presented praying for a conveyance of the fee; and so far as relates to the petition and the first hearing, we think that both parties should abide their own costs. But with regard to the costs of the proceedings at law, in which Mr. Douglas failed, we are of opinion that the petitioners should have their costs. We also think that they are entitled to the costs of the second hearing, when the matter came before us on the return of the hearing; for that hearing was rendered necessary by Mr. Douglas having

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obtained an order for liberty to bring the ejectment to try a question, in which he afterwards failed. And with respect to the costs which have been incurred in the subsequent proceedings, it is to be observed, that the matter of this petition would have been disposed of upon the second hearing, if Mr. Douglas had not then set up the present claim, in which, also, he has failed. As to the water-course, the petitioner, by the order under which the present report is made, admitted the right of the respondent to it, as fully as it has been established before the Remembrancer. The real and only matter in dispute was the right of turbary. For the reasons assigned, we are of opinion that Mr. Douglas has failed in establishing his claim to the turbary; and, therefore, we think that the costs incurred since the last hearing, including the costs of the present hearing, should be paid by the respondent.

We are also of opinion, that the petitioners ought to have liberty to amend their petition, by striking out that part of it which contains their offer with regard to the right of turbary claimed by the respondent. We give no opinion, whatever, upon the decision of the Master of the Rolls in *Byrne v. Hugo*.

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The Right Honorable CHARLES WILLIAM,
Earl of FITZWILLIAM, Plaintiff;
The Reverend HENRY MOORE, Defendant.

(In the Rolls.)

June 12, 21.

THIS was a motion on behalf of the plaintiff on bill and answer for an injunction prayed by the bill, to restrain the defendant and his agents, &c., from encroaching upon the church-yard or burying-ground belonging to the parish church of Carnew, by erecting a school-house or other building thereon, or any part thereof, until a faculty or license of the Ordinary of the diocese for that purpose should have been duly obtained, and pending all proceedings in relation thereto, and all appeals, if any, to be brought against the grant or issuing of such faculty; and that if it should appear that the said defendant had already obtained a faculty or license, he should be restrained from so proceeding to encroach or build as aforesaid, pending the suit to be instituted by the plaintiff, to have said grant, faculty or license, revoked.

The bill was filed by the plaintiff as a parishioner, on behalf of himself and the other parishioners, and stated that there was and had been from time immemorial a parish church, church-yard and burial-ground, in the parish of Carnew in the county of Wicklow and diocese of Ferns, which the parishioners were in the habit of using, and by law were entitled to use for purposes of Divine Worship, and for burial without fee or charge. That the lands adjoining and surrounding the church-yard, together with very extensive estates in the said parish, were and had been for many years in the tenure and possession of the plaintiff and his ancestors, and that the plaintiff was then seized of a freehold estate in possession of and in the said several lands and premises, and was possessed of a mansion-house in said parish, at which he occasionally resided; and that plaintiff and his tenants, parishioners of said parish, were entitled to all the rights and privileges of parishioners of said parish.

That the said church-yard having, by reason of the number of persons buried there of late years, become insufficient for the use and burial of the said tenants and parishioners dying from time to time, the plaintiff had some few years ago, at the special instance and request of the tenants and parishioners, granted free of rent a piece of ground to be added to said church-yard, which was added accordingly, and had ever since been

Application by a parishioner for an injunction to restrain a Rector from encroaching upon the church-yard and parish burial-ground, without any faculty or license from the Ordinary for that purpose, by building a school-house thereon, refused,—it appearing, that although no faculty had been formally obtained, the Bishop was in fact a consenting party, and that from the condition of the proposed site, no irreparable injury could be done; the Ecclesiastical Court having the proper authority *ratione loci* to have the building removed if unlawfully erected, and to punish the person guilty of erecting it.

This Court may interfere at the suit of the Crown to restrain a Bishop from wasting the property

ty of the See, or at the suit of the patron of a living to restrain the Incumbent from wasting the glebe-house or lands; but *semble* as to the church and church-yard, the Ecclesiastical Court having *ratione loci* the proper jurisdiction, this Court has never interfered to restrain the acts of the Incumbent with respect to them.

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part of same; but notwithstanding such grant, the said church-yard or burial-ground continuing to be insufficient, the plaintiff, and his eldest son Lord Milton, on the 17th of April 1840, at the further instance and request of the tenants and parishioners, granted to the church-wardens a further piece of ground containing thirty perches, for ever, as and for the site of a new parish church and burial-ground for the said parish, but upon condition and subject to re-entry upon the same or any part thereof being applied to any other than the uses to which the said grant was made. That such grant was made upon the representation of the Rector and the church-wardens, as well as the parishioners, generally, that it was necessary for the accommodation of the parish in consequence of the ancient church-yard being too small; and that the plaintiff would not have made such grant but upon such representation, and believing it to be true,—the fact being that the said parish was large and populous, and the old church-yard comparatively small.

That the defendant being the Incumbent of said parish, had lately threatened, and had actually began to encroach upon the ancient church-yard, by proceeding to erect a school-house and other buildings thereon, and for that purpose had cut down and felled various trees and shrubs growing thereon, and to appropriate a considerable portion of the said church-yard to such building; by reason whereof the burial-ground of the parish would be rendered totally insufficient, and great scandal would arise and insult be offered to the feelings of the parishioners thereby, and inasmuch as the said encroachment and making of the proposed site for said building, would trespass upon the graves of two children, and otherwise offend the plaintiff and the greater number of the parishioners, and all those whose relatives and friends had been buried from time to time in the said church-yard, which was consecrated ground.

That on the 4th of May 1841, plaintiff caused a notice to be served on the Rector and church-wardens respectively, cautioning them against making any such encroachment, or erecting a school-house or other building on said church-yard; and apprising them that in case of their persisting in making such encroachment by erecting such building, the plaintiff would take such legal proceedings against them as he should be advised. That notwithstanding such notice, and since the service thereof, the said Rev. Henry Moore persisted in his intention of encroaching upon the said church-yard by such building, and in pursuance of such intention, he and his agents and servants threatened to commence breaking up the soil and digging the foundation for said buildings; that no faculty or license for that purpose had been obtained by the defendant.

That neither the plaintiff nor the other parishioners could obtain in the Ecclesiastical Court any injunction or other mode of prevention of the intended encroachment, although he or they might, in the event of such encroachment having been made, proceed by a suit in that Court for the

punishment of the person by whom such unlawful encroachment was made, and for the removal of the building thereby erected, but that such proceeding would be attended with great delay and expense, and could not afford adequate relief, as the injury by means of such encroachment would be irreparable. That no encroachment by building or otherwise, could lawfully be made upon the church-yard, without a faculty or license from the Ordinary; that on the 3rd of May 1841, the plaintiff had caused a *caveat* to be entered on the registry of the Consistorial or Bishop's Court of Ferns, against the granting of such faculty without notice to the plaintiff, and that he was advised that he could successfully resist any application in said Court for such license.

The agent of Lord Fitzwilliam made an affidavit verifying the principal allegations in the bill, and further deposing that the said Rev. Henry Moore had lately convened a meeting of the parishioners for the purpose of taking into consideration the propriety of erecting a school-house upon a part of the old church-yard, and that such meeting having been attended by deponent and a great number of the parishioners, the said Rev. Henry Moore refused to put the intended resolution to the meeting, but with the assent of one of the church-wardens entered it upon the vestry books as an act of vestry at such meeting; that the said Rev. Henry Moore having been called upon to take the sense of the said meeting as to the said resolution, and having refused so to do, the parishioners at said meeting thereupon appointed their own chairman and passed a contrary resolution, to the effect that no school-house or other building should be erected upon any part of the said church-yard. That in the opinion of deponent and of Lord Fitzwilliam, and of a large majority of the parishioners, the erection of a school-house in the church-yard was uncalled for and unnecessary, inasmuch as the said Earl Fitzwilliam had some few years ago built a large and commodious school-house, and a dwelling-house for a school-master and school-mistress, within a hundred yards of the said church-yard, at the said Earl's own expense, for the use of the children of his tenantry of all religious persuasions; that since the erection thereof, the said Earl had paid upwards of £200 per annum to a school-master and school-mistress for attending and teaching thereat; and that it had been attended by a great number of children of the said parish, and visited by the said Rev. Henry Moore and the Roman Catholic clergy of the parish until lately, when the said Rev. Henry Moore ceased to attend or visit it.

The answer of the defendant admitted the rights of the parishioners respecting burial, &c., as stated in the bill, and that about twelve years ago, the church-yard of Carnew having become, by reason of the number of persons interred therein, likely to become insufficient for the use of the parishioners, the complainant at the special instance and request of this defendant, granted free of rent a piece of ground adjacent to the original

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church-yard, and about one half the size thereof, to be added thereto; that such addition was accordingly made, and had ever since been part of the church-yard. That it was not in consequence of the said church-yard continuing, notwithstanding such addition, to be insufficient for the use and interment of the parishioners, that the further grant was made by the complainant and his son in 1840, but because the church having been found to be too small, was examined about two years ago by the provincial architect, with a view to its enlargement, and upon such examination he condemned the building, and advised that a new parish church should be erected in a more convenient situation; that in consequence of such advice, the further grant was made for the site of such new church with a suitable enclosure, but not a yard for interment, and that a liberal subscription was also given by the complainant towards the expense of erecting such new church. That the consent of the principal landed proprietors of the parish having been obtained to the proposed change of the site of the parish church, a memorial was presented for the assent of the Lord Lieutenant and Council, as required by law before such change could be made, and that in the first instance the complainant was active in promoting the measure of building a new church upon the site lately granted for that purpose, but having afterwards conceived a displeasure with defendant respecting the management of the school as after mentioned, determined to prevent the erection of the new church, and on the 22nd of March 1841, presented a counter memorial, stating that he had been induced to sign the previous memorial by representations as to the insufficiency of the existing site for a suitable parish church and church-yard, but that since the presentation of such memorial, certain proceedings had been taken by the Rector, by which it would seem that the existing church-yard was not in his opinion so insufficient as represented, inasmuch as without knowing what would be the answer to the memorial presented by him, it had been proposed by the said Rector to appropriate a certain portion of the said church-yard to the erection of a school-house for the purpose of conducting education there under the system of a society called the *Church Education Society* for Ireland, such system being directly at variance with that recommended by the *National Board of Education*; and therefore praying that if upon inquiry it should appear to the Lord Lieutenant advisable to sanction the erection of the new parish church upon a site different from that of the present one, his Excellency would make such provisions as would prevent the appropriation of the old church-yard in the manner apprehended, not only because the intention of such appropriation was not disclosed to memorialist when he was requested by the said Rector to sign the memorial presented by him, but also because memorialist had reason to believe that one of the objects of the said Rector was to prevent the education of his parishioners being carried on as it then was in the

schools maintained by memorialist upon a system similar to that of the National Board. The defendant further stated that in consequence of such counter memorial no answer had as yet been given to that presented by him. He denied that the grant made in 1840, was for any other purpose than as and for the site of a new parish Church; or that it was at all intended as for a new burying ground, or that it was made in consequence of any insufficiency of the church-yard for the use and interment of the parishioners. He admitted that the parish was large and populous, but stated that the church-yard was now capable of affording ample accommodation for the interment of the parishioners for many years to come. He admitted that under the circumstances after mentioned, he was about to appropriate a small portion including only 64 feet by 30 of the south-west corner of the ancient church-yard, but not any part of the ground granted by complainant, to the erection of a school-house for instruction, according to the principles of the Church of England, of 160 of the Protestant children of the parish, of whom the boys were receiving instruction in the vestry room of the church, and the girls in temporary class-rooms engaged by the defendant, there being no school-house for said children, nor, under the circumstances, the possibility of procuring one otherwise than as proposed by defendant.

He denied that he ever intended or threatened to erect any other building in the church-yard than a school-house, and further denied that the appropriation of the small spot intended for such purpose would be a great or any detriment to complainant or the parishioners, or injuriously reduce the extent of burying ground in the church-yard, or that it would outrage the feelings of a majority of the parishioners whose departed friends and relations had been interred in the said church-yard, or create scandal by trespassing on the graves of two children; the fact being that one hundred and seventy-seven out of two hundred and two heads of Protestant families in the parish expressly desired and voted for the erection of the school-house upon the intended site, the said site being a rocky spot in which only one interment had taken place within one-and-twenty years, and from which the remains of the person interred were soon afterwards removed, on the special ground, as stated by the brother of the deceased, that the spot was impracticable as a family burial place. The defendant admitted that there were within the intended site the remains of the graves of two children, but of a period so remote that the date of the burials could not be ascertained, nor did any one in the parish know who the children were or to what families they belonged: that the proposed building would not disturb their graves, the intention being to run the flooring over them in the same manner as that actually adopted in the construction of the church itself.

That the school supported by the complainant, and mentioned in his bill, was founded by his father, the late Earl, and conducted for several

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years under the superintendence of the Board of Trustees of Erasmus Smith, from whom it had a grant, and was chiefly managed by this defendant and his curate ; that of late years it was placed under the management of a committee constituted, as the defendant and his curate believed, upon very objectionable principles, and new rules, in violation of those indispensably required in the schools under the Board of Erasmus Smith were adopted, in consequence of which that Board withdrew its grant from the school ; that the defendant and his curate felt themselves coerced by a sense of duty to withdraw from the committee ; and that, being placed under what they deemed improper restraints in their care and superintendence of the Protestant children in the school, they ultimately ceased altogether to teach at or visit it, but not until after several remonstrances addressed by the defendant to the complainant on the subject of the objectionable regulations of the school had been disregarded.

The defendant further admitted that he had cut down a few trees and shrubs growing in the church-yard, but stated that the trees so cut down had been appropriated to the use of the church ; that he did not take any step towards the appropriation of the small spot in the corner of the church-yard for the erection of a school-house until after he had consulted the Bishop of the diocese, and obtained his assent thereto and his promise of a subscription for the intended school, as also the assent of the churchwardens and a large majority of the Protestant parishioners, nor until it appeared that the site for a suitable school-house for the Protestant children of the parish could not otherwise be procured. That the complainant being the landlord of all the lands in the neighbourhood of the church, a memorial was presented to him from one hundred and seventy-seven out of two hundred and two heads of Protestant families in the parish, praying him "to grant, or let, "or permit the purchase of a piece of ground for the erection of a school-house ;" to which, on the 27th of February 1841, he answered, positively refusing to comply with the prayer of the memorial, on the ground that he deemed the existing school sufficient.

That being under the belief that a vote at vestry was necessary to render the appropriation of any part of the church-yard for the erection of a school-house legal, defendant summoned a vestry meeting ; that shortly before the meeting he saw the draft of an opinion of Dr. Stock, by which it appeared that he had acted in error in calling the meeting, and that the intended vote was wholly unnecessary ; that the meeting being attended at complainant's desire by several Roman Catholic clergymen with their flocks, defendant declined putting any question to the meeting, wishing to avoid the unpleasant discussion which should otherwise ensue, and in due form dissolved the meeting and left the church with his friends. He admitted, however, that an entry signed by himself and one of the churchwardens was made in the vestry book as of

that date to the effect that at a vestry duly convened it was resolved, that the south-west corner of the church-yard might be appropriated to the erection of a school-house : but further stated that there was no intention of acting upon it. That subsequently, a resolution of the Rector and the churchwardens of the parish, and signed by them respectively, allocating the south-west corner of the church-yard for the erection of a school-house was duly entered in the vestry book.

That the Roman Catholic parishioners had for several years discontinued the use of the parish church-yard for the burial of their dead, preferring the burying grounds attached to their own places of worship ; that before such discontinuance, they used that part of the yard lying to the east exclusively, and never the westward side, at one corner of which was the intended site for the school-house.

Mr. *Brewster*, Q. C., and Mr. *Radcliffe* for the motion.—It is to be lamented that the Reverend defendant has thought it necessary to encumber his answer with a long account of a difference of opinion between him and Lord Fitzwilliam on the subject of education, and to give to this difference the character of religious controversy. Whether the system of education for the children of the poor approved of by Earl Fitzwilliam or that sanctioned by the defendant be the right one, is a question on which this Court will not adjudicate, and which has nothing to do with the real question in the cause, namely, whether this Court will interfere to prevent an unlawful encroachment upon a parish church-yard, the Ecclesiastical Court not having jurisdiction to afford such relief. There can be no doubt that the resolution of the Rector and churchwardens could not justify the appropriation of any part of the church-yard to any other than the purposes for which it was originally intended and consecrated ; they could not make a pathway across it, much less appropriate part of it for the erection of a school-house, without a faculty from the Ordinary for that purpose : *Roger's Eccl. Law*, 238 ; *Rosher v. Vicar of Northfleet* (a) ; *Ex parte Blackmore* (b) ; *Bryan v. Whistler* (c). A faculty could not be obtained without giving notice of the application for it to the parishioners whose rights it would affect ; *Tattersall v. Knight* (d) ; *Partington v. Rector of Barnes* (e) ; they would be entitled to shew cause against it, and if in their opinion improperly granted, they should have an appeal to the Metropolitan, and again from him to the Court of Delegates.

It will be urged upon the other side that our application should be to the Ecclesiastical Court, which has jurisdiction *ratione loci* ; but to that

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(a) 3 Ada. 14, 15, 4 Hag. 164.

(b) 1 B. & Adol. 122.

(c) 8 B. & Cress. 293.

(d) 1 Phill. 232.

(e) 2 Ph. T. Lee. 345.

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objection there is the plain answer, that although the Ecclesiastical Court may have jurisdiction sufficient for the purpose of a vindictive prosecutor—although it can severely punish the offender, and apply a remedy after the mischief has been committed, it has not that jurisdiction the exercise of which is alone desired in this case, namely, the jurisdiction which can prevent a mischief irreparable in its nature—the injury to be done to the rights and feelings of the parishioners by disregarding, and misappropriating, for however short a time, the consecrated ground which both religion and the law of the land have set apart and given to them for their burial.

Mr. Warren, Q. C., and Mr. Whiteside, *contra*.—Every sentence in the defendant's answer is pertinent and material. The answer demonstrates by the documents which it sets forth, that whatever may be the strict law of which the complainant seeks to take advantage, the manner in which he has brought forward his case disentitles him to any favour in this Court; that having refused the prayer of one hundred and seventy-seven out of two hundred and two heads of Protestant families in the parish of Carnew "*to grant, or let, or permit the purchase*" of any small spot on his extensive estates in the parish for the erection of a school-house where Protestant children might be educated under the superintendence of their pastors, and receive that form of Scriptural instruction approved of by their parents and spiritual guides—and having by such refusal driven the Protestant parishioners and their pastor to their last expedient of appropriating for the desired purpose a corner of the church-yard which happens to be impracticable as burying ground—the noble complainant now comes to this Court, professing to care for the poor, and asks for an injunction to prevent their rights and feelings being injured and outraged by the threatened encroachment upon the church-yard, while his real purpose is to induce this Court to lend its high power to enable him to take by violence from the Protestant poor of the parish of Carnew all means of education, if they cannot overcome their religious objections to the system which he has thought proper to approve of.

The point of law on which he relies is at most one of mere form. The Bishop of the diocese has not only assented to the intended encroachment on the church-yard by the erection of a school-house, but has promised a subscription towards defraying the expenses of it, and there can be no doubt that if, in such a case, it were proper to incur the costs of an application for a faculty, it would be granted. The complainant knows this, but his equity is, that although the Bishop should grant the faculty, he can appeal against such grant to the Metropolitan, and although the Metropolitan should affirm the grant, he can still further appeal to the Court of Delegates, and therefore asks the Court to grant an injunction pending all this litigation on the intended appeals in the Ecclesiastical

at although he fairly promises that he will prolong such litigation to the purpose of the most, and he may shrewdly expect that before such a course is half ended, the Rector and churchwardens of Carnew will be ruined by their expenses, and the funds for the Protestant school-house totally exhausted. we submit that in no view of this case could the present application be sustained. The soil and freehold of the church-yard are in the nature of a common: *Boothly v. Baily* (a); *Com. Dig. tit. Cemetery*, 2: and the care of the church-yard is entrusted to the churchwardens: *Quilter v. Newtown* (b); therefore, the consent of the Rector and churchwardens is in general deemed sufficient to justify any alteration or encroachment upon the church-yard, and a plea of such consent was held to be a good answer to articles for setting up a monument which by its extraordinary dimensions was in the nature of an encroachment on the church-yard: *Sayer v. Bowles* (c). The churchwardens could not of themselves make an alteration without the consent of the Incumbent; but where both the Rector and churchwardens consent, the Ecclesiastical Court will sanction an act done although without a license, if such a license should have been granted, by analogy to the doctrines of equity in the cases of trustees and guardians; *Walter v. Montague* (d); *Roger's Eccles. Law*, 437. In cases of nuisance in a church-yard, the Ecclesiastical Court has the exclusive jurisdiction *ratione loci*: *Quilter v. Newtown* (b); *Burton v. Calcott* (e); *Cade v. Newnham* (f); *Wilson v. M'Math* (g); *Large v. Alton* (h); *Wenmouth v. Collins* (i). The bill does not make out any thing like a case of waste; and even if it did, the Court would not grant an injunction at the suit of the plaintiff, who entitles himself merely as a parishioner; *Strachy v. Francis* (k); *Knight v. Mosely* (l); *Wither v. Dean of Winchester* (m); *Jefferson v. Bishop of Durham* (n).

MASTER OF THE ROLLS.

[After stating the case made by the bill and the contents of the defendant's answer, and after observing that the entry admitted by the defendant to have been made in the vestry-book and purporting to be a vote or resolution of a meeting at vestry, held, according to legal notice, on the 16th of February 1841, was inaccurate and ought not to have been made, but that in the present case nothing turned upon it, his Honor proceeded to deliver his judgment to the following effect]:—

(a) Hob. 69.

(c) 1 Adams, 541.

(e) 3 Phil. 90.

(g) 3 Phil. 89; S. C. 3 Bar. & Ald. 245.

(i) 2 Ld. Raym. 850.

(l) 1 Amb. 175.

(b) Cart. 151.

(d) 1 Curt. 200.

(f) 3 Phil. 90.

(h) Cro. Jac. 462.

(k) 2 Atk. 217; S. C. 1 B. & Pul. 115, n.

(m) 3 Mer. 421.

(n) 1 Bos. & Pul. 105.

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I am now to decide whether or not upon the facts disclosed on both sides I should grant the present application, and at the plaintiff's suit restrain the defendant by injunction from erecting the school-house in the corner of the church-yard? The injunction sought for is, &c. (His Honor here read the prayer of the bill already stated). It has been said on the discussion of the motion, that the Reverend defendant has stated matters in his answer which do not properly belong to the case, and that the question raised by the bill has nothing to do with the differences which may exist in the defendant's parish as to the proper mode of educating the children of the parishioners; but I am clearly of opinion that the answer is not open to any such objection, and that whether viewed with reference to the statements in the bill, or as necessarily disclosing facts by which the real motive for filing the bill might appear, it does not contain any statement which the defendant ought not to have made. Lord Fitzwilliam entitles himself as a parishioner, and his case is, that the erection of the intended school-house will be an encroachment upon the parish church-yard, to the great detriment and injury of the plaintiff and the other parishioners—that it is wholly unnecessary, there being at present a very sufficient school—and that by reason of the intended encroachment “great scandal will arise, and insult be offered to the feelings of the parishioners.” Surely it cannot be said that when the defendant by his answer states facts tending to shew that by the intended encroachment no injury or scandal could arise, and that the present school is one at which all the children of the parish cannot be educated consistently with their religious opinions, he is introducing matter irrelevant to the case.

But assuming the facts to be as set forth in the bill, and the law to be as stated by plaintiff's Counsel, the question still remains, whether this Court should grant at the plaintiff's suit the relief sought by him.

The case, if to be considered one of nuisance, should properly be within the jurisdiction of the Ecclesiastical Court *ratione loci*, and could not, I think, be maintained upon the grounds on which the Court of Chancery would interfere in cases of nuisance. But, supposing that the Court would restrain an ecclesiastic by injunction from committing waste or doing an act of irreparable injury in the church-yard, or other land in his possession in right of the church, and that the plaintiff seeks to sustain his application upon that ground, it remains to be considered whether upon the facts now appearing, a case of waste or irreparable injury is made out, and if so—whether the plaintiff as a parishioner is entitled to complain of it.

The cutting down, for the use of the church, a few trees growing in the church-yard, was not waste, but the lawful act of the Rector; nor could the erection of the intended school-house upon the proposed site and in the manner specified be considered as waste, nor as an act of ir-

reparable injury. The intended building it appears will disturb nothing. If the erection of it without a license be unlawful, it may be removed, and the ground upon which it is to stand be restored to the church-yard as before. It is plain from the facts, as stated in the defendant's answer, that no inconvenience will be sustained by the parishioners if this Court shall refuse, pending such proceedings as they may be advised to take, to restrain the erection of the intended school-house, but that very serious inconvenience must ensue if the Court were now to adopt a different course.

Again, supposing that the facts committed or intended by the defendant to be such as to fall within the general principles which govern the interference of this Court in cases of waste or threatened injury of an irreparable nature, a question would arise as to the jurisdiction *ratione loci*. No case has been cited, nor am I aware of any in which this Court has ever interfered at the suit of a parishioner, to restrain the Incumbent of a parish from making such alterations as he might think proper in the church or church-yard. If the alterations be unlawful, the Ecclesiastical Court has jurisdiction to punish the person, whoever he may be, who has been guilty of making them. Even as to church-lands in general, the cases cited on the motion clearly establish that although this Court may interfere to restrain waste, it will do so only upon the application of one duly entitled to make it. At the suit of the Crown, a Bishop may be restrained by the injunction of this Court from wasting the property of the see; and in like manner, at the suit of the Bishop or other patron of a living, the Incumbent may be restrained from wasting the glebe-house or lands; but if the Bishop or patron consents to the Incumbent's act, the authorities go to shew that it is not for a parishioner to complain. [His Honor here adverted briefly to the following authorities:—1 *Amb.* 176; 3 *Mer.* 421; 2 *Atk.* 217; 2 *Bro. C. C.* 552; 2 *Ld. Raym.* 850; 3 *B. & Ald.* 245.]

The decision of Chief Justice Eyre in *Jefferson v. The Bishop of Durham* was cited with approbation by the Lord Chancellor in *Wither v. The Dean and Chapter of Winchester* (a). In the former case it is said that only the Bishop or patron of a living is entitled to restrain the Incumbent from committing acts of waste upon it; and for that reason, in the latter case the Court refused to interfere at the plaintiff's suit. This Court is not anxious to interfere in cases where the property in question belongs to the church, and the Ecclesiastical Courts have jurisdiction. In *Henry v. The Dean and Chapter of St. Paul's* (b), the Master of the Rolls seemed to be of opinion that in the case of church property the matter ought to be left to the Ecclesiastical Tribunals. In an *Anonymous* case (c), Lord Hardwicke refused to entertain a motion relative to a

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(a) 3 *Mer.* 421.

(b) 3 *Swst.* 510.

(c) 2 *Ves. sen.* 451.

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proceeding in the Ecclesiastical Court; he said, "It was turning every thing into English bill in this Court, the Ecclesiastical Court had jurisdiction of it;" and as to the discovery sought, he says—"The coming into this Court in aid of the ecclesiastical jurisdiction is always denied; the plaintiff cannot, because this Court will not be ancillary to that; nor does the defendant then want it, because he may exhibit articles in that Court and have an answer on oath, which is the constant course there."

Upon the whole of this case, I am of opinion that I ought not interfere, but leave the plaintiff to proceed in the Ecclesiastical Court as he may be advised. The case upon the merits is very clear: the plaintiff comes not as a party litigating in the Ecclesiastical Court and asking this Court to preserve the property in question until the right shall have been determined by the Ecclesiastical tribunal; but under circumstances which can leave no doubt as to what would and ought to be the decision of the Ecclesiastical Court if any suit were instituted there, he asks this Court by its interference to put the defendant under the necessity of making an application to the Ecclesiastical Court, which he seems to be aware should be granted as of course, but which he promises to resist to the uttermost, and make the ground-work of vexatious and protracted litigation by his intended appeals, pending all which he asks that the defendant shall be restrained by the injunction of this Court. It appears that the Bishop has already consented to the building of the school-house, so that there can be no doubt that the faculty would be granted if applied for, and I would say that the facts disclosed by the pleadings are such as would not merely justify the Bishop in granting such license, but render it his imperative duty to grant it if applied for. A memorial signed by one hundred and seventy-seven out of two hundred and two heads of families professing the Protestant religion in the parish is presented to the plaintiff, whose estate covers nearly the whole parish, praying him "to grant or let, or *permit the purchase of*" a mere patch of ground—sixty-four feet by thirty—for the site of a school-house at which their children might receive such religious instruction as they and their pastor approve of. The plaintiff refuses the small request, upon the ground that he deems the existing school-house sufficient, although he knows that the existing school is conducted upon principles at variance with the religious opinions of the memorialists. What, in effect, is this, but saying, either you must submit your children to a system of education which you and your pastor believe to be wrong and inconsistent with your religious principles, or I will not allow them to have any education at all? I cannot conceive a more odious tyranny than that which would deprive a person of the benefits of education unless he will do that which his conscience disapproves of. Every man has an undoubted right to follow the faith which his conscience approves of, and any attempt to compel him to do otherwise is a tyrannical exercise of power. If not one

hundred and seventy-seven, nor seventy-seven, but only one family in the parish conscientiously entertained objections to the system of education observed in the present school, their scruples ought to be respected, and their humble prayer for leave to purchase a small plot for a school-house ought not to have been refused.

With the merits of the rival systems of education this Court neither has nor can have any thing to do. Whatever may be supposed to be, or in fact may be, my own private opinion of the controversy, I must regret that the complainant has taken and pursued so far such a course respecting it; and I am bound to notice and to deprecate the very improper attempt to impose upon this Court, and to induce it, by means of an uncandid statement disguising its real object, to suffer its jurisdiction to be used as the instrument of party strife and actual oppression.

I am clearly of opinion that the present motion must be refused, and with costs.

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Costs after abatement.—*See* COSTS, III.
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In 1814, the Grand Canal Company created certain stock with peculiar advantages to the subscribers, the legality of which was doubtful. In 1831, they empowered the Court of Directors to exchange for new stock, such stock of 1814 as the holders thereof were willing to bring in, upon certain terms. The plaintiffs, one of whom was a Director, and the other a stockholder, and both subscribers to the stock of 1814, refused to accede to the terms offered by the resolutions of 1831; but having so acted, that by their conduct they might have induced other stockholders of 1814 to accept of the arrangement proposed by

the resolutions of 1831—upon a bill filed for a specific performance of the terms of the resolutions in 1814, they were refused relief in respect of the stock of 1814. *E. E. Corballis v. The Undertakers of the Grand Canal Company* 29

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1. A gift of personal annuities to A. and B., "for themselves and their children," they not having any at the date of the will or the death of the testator, gives them the absolute interest. *C. Heron v. Stokes* 163
2. An agreement for the payment of a personal annuity for the joint lives of A. and B., will be specifically performed, and the defendant decreed to pay it, on the ground that there is no adequate remedy at law. *C. Swift v. Swift* 267
3. "Whenever an annuity is charged on land, I consider it perfectly settled, that the party is entitled to come into a Court of Equity for that which is the appropriate relief in such a case, namely the appointment of a receiver." *Per* Lord Plunket, in *Ibid* 274

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1. A purchaser cannot be attached for not completing his purchase until after a report of good title has been obtained. R. *Vincent v. Going* 480
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BANK AND BANKERS.

1. The Bankers' Act, 33 *G.* 2, c. 14, is not repealed by the 6 *G.* 4, c. 42; and, therefore, upon the stoppage of payment by a Joint Stock Banking Company formed under the latter statute, a trust is created in favour of the creditors, and affecting all the property of the shareholders—under the Bankers' Act, which may be administered by this Court, at the suit of any creditor against the Public Officer of the company, instituted without making the other creditors or the shareholders parties;—it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities

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of the company, and it not appearing that the shareholders have any other liabilities than those of their co-partnership. R. *Fawcett v. Hodges* 232

2. Upon a creditor's bill founded on the equity of 33 *G.* 2 (Bankers' Act), against the Public Officer of a Joint Stock Banking Company, consisting of a very large number of persons incorporated and registered pursuant to the provisions of 6 *G.* 4, c. 42, the bank having stopped payment, an injunction to restrain the Directors, &c., from interfering, and a receiver to collect the joint property, &c., appointed before answer, the defendant having made an affidavit for the purpose of resisting the motion, and going into the merits of the case. Form of the order: authority and duties of the receiver—his recognizance and sureties, and remuneration. R.—*Acheson v. Hodges* 516
3. The 33 *G.* 2, c. 14, applies to Joint Stock Banking Companies registered under 6 *G.* 4, c. 42. R. In *Ibid* 518, 521, 523
4. "I am of opinion that by virtue of the 33 *G.* 2, a trust was created for the creditors when the bank stopped payment; and being of that opinion I cannot refuse a creditor, who makes a proper case for it, the relief which I believe him entitled to in virtue of the trust." *Per* Sir M. O'Loughlin, M. R. in *Ibid* 521

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BANKRUPT AND BANKRUPTCY.

1. A creditor by judgment entered pursuant to a warrant of attorney, obtained an order for a receiver under the 5 & 6 *W.* 4, c. 55, more than two calendar months before the issuing of a commission of bankrupt against the respondent, the cosutor; *Held*, that his execution was protected by the 95th section, from the operation of the 126th section of the 6 *W.* 4, c. 14. E. E. *Read v. Davis* 153
2. A creditor will not be permitted to prove upon the bankrupt's estate for bills or notes, if notice of dishonour be not given to the bankrupt before the bankruptcy, or to the assignees subsequently. B. *In re Mullen* 361

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3. Application by bankrupt after an absence of eight years in America, to be at liberty to surrender himself to the Commission and pass his final examination, *refused*. The petitioner not having used due diligence since his return in communicating with his assignee, or seeking personal interviews with his creditors. C. *Ex parte Wyse* 361
4. If upon application for payment by the agent of the assignee to a party returned as debtor to the bankrupt, no satisfactory explanation be given, a summons will be issued, requiring the party to attend at his own expense before the Commissioners, and give every information with respect to the debt; and if the debt be not due, an acquittance can be proved of it. B. *In re O'Connor* 363
5. It is discretionary with the Commissioner to give any costs or charges to the summoned party suspected of having bankrupt's property, or supposed to be indebted to the bankrupt. B. in *Ibid* 364
6. Application to be at liberty to prove and receive dividends upon bank notes purchased from various holders, after the date and issuing of the commission, *refused*. No satisfactory evidence having been given to the Court of the *time* or *place* of the purchase of the notes; the *price* paid for them, or that the parties from whom they were purchased were *bonâ fide* holders. B. *In re Delacour* 573
7. Assignee not chargeable with penal interest for the detention in his hands of monies of the estate, if direction was not given under the 49 G. 3, c. 121, ss. 3, 4, and under the 122nd section of the 6 W. 4, c. 14, by the creditor or Commissioner to lodge such monies in bank. B. *In re Fahy* 585

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"In several cases it has been held that where money was lent on credit given by two persons, who passed a joint bond for it, the instrument was to be considered as joint and several, according to what appeared to have been the intention of the parties." *Per* Sir M. O'Loughlin, M. R., in *O'Leary v. Purcell* 344

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2. The affidavit of service did not state that the persons served were the only persons in possession of these lands, which the Court considered a fatal defect *Ibid*

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After final decree in creditor's suit, a consent in the nature of an allocating report will not be made a rule of Court, unless signed by all parties who have come in under the decree as well as by the parties in the cause; and there must be an affidavit to that effect. *R. Cook v. Briscoe* 28

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I. In Creditors' Suits.

1. A creditor who proves his demand under a decree for the administration of assets, will not be heard upon the final hearing of the cause to ask for costs incurred by him in the office in reducing the plaintiff's demand: there being no special case made for that purpose by the report. *E. E. Loughny v. Dillon* 55
2. A simple contract creditor, who institutes a suit for the administration of personal assets, and seeks to have his costs as against judgment and specialty creditors who may come in under the decree, ought to make a case for it by his bill and shew that a suit was necessary for the due administration of the assets, and payment of his debt; or else that by his exertions, he has made a fund available,

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which would otherwise have been lost. *E. E. Drake v. Forde* 56

3. Before the passing of the 5 & 6 W. 4, c. 55, a judgment creditor proceeded by *elegit* and inquisition, but was kept out of possession of the estate by prior creditors; he afterwards obtained an order extending a receiver obtained on the petition of a prior creditor to the matter of his petition on his judgment; *Held*, that he was entitled to the costs of the proceedings at law in the same priority with his demand. *E. E. Barry v. Wilkinson* 121
4. The final decree ordered a defendant to have his costs against the plaintiff, and the plaintiff to have them over with his own costs, out of the money arising from the sale. The plaintiff was a *puisse* reported creditor. The Court refused to pay him the amount of those costs (for payment of which the defendant was proceeding against him by attachment), out of rents brought in by the receiver; but stayed the defendant's proceedings until further order. Such a decree for costs is not to be enforced against the plaintiff unless the fund be insufficient, or he be guilty of *laches* in the prosecution of the suit. *E. E. Crofts v. Poe* 151
5. A creditor who has been stayed from proceeding in his suit, and compelled to come in under the decree in another suit, will not be ordered to contribute to the costs of the plaintiff in that suit, as between attorney and client. The rule only applies to persons coming in voluntarily under the decree. *E. E. O'Brien v. Fitzgerald* * 159
6. Costs of the suit given to the plaintiff, a simple contract creditor, in priority to the demands of judgment and specialty creditors: the suit being necessary, and having been properly conducted. *E. E. Jameson v. Farrer* 346
7. The costs of incumbrancers upon a fund charged upon an estate, are to be borne not by the estate, but by the fund. *E. E. — v. Henry* 493
8. One of several *cestui que trusts* of a fund charged upon land, filed a bill against the owners of the estate, the other *cestui que trusts* and the trustees (who had refused to act), to raise its amount and for payment thereof to the

persons entitled; *Held*, that the suit being for the benefit of all the *cestui que trusts*, they were bound to contribute in proportion to their shares, to the difference between the taxed costs between party and party, and the plaintiff's costs of suit taxed as if he were the trustee of the fund. *E. E. Bagge v. —* 494

9. The value of a settled estate being less than the sum charged thereon for younger children's portions, the inheritor filed a bill against the younger children for a sale of the estate; and at the final hearing asked for his costs in priority to their demands; *Held*, that in the absence of any agreement to that effect, he was not entitled to them: overruling *Head v. Massey*, 2 Moll. 467. *E. E. Hughes v. Nash* 495

10. Creditors who prove under a decree obtained in a suit instituted by a legatee for the administration of the assets of the deceased, are not bound to contribute to the difference between the plaintiff's costs between attorney and client and party and party. *E. E. Lynch v. Skerrett* 504

II. Solicitor's Lien for, Liability to, and Taxation of.

1. Where several children appeared, and proceeded jointly by the same solicitor for a sum to which they were entitled in equal shares, and incurred costs to a considerable amount; two of the children having died, and there being a continuing litigation as to the persons entitled to their shares, the solicitor in the mean time allowed the surviving children to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable, and he now applied for payment out of the sum in bank (*i. e.*, the shares of the two deceased children) of the entire amount of the costs:—*Held*, that the shares of the two deceased children were liable in the first instance for that proportion only of the costs which they should have paid if the others had contributed equally; and that it was the duty of the solicitor to have taken care that the costs should be borne equally by the several younger children. *R. Crone v. O'Dell* 12

2. If the plaintiff's attorney wilfully in the

bill describe the plaintiff as resident within the jurisdiction, when in fact he is resident out of the jurisdiction, he will be ordered to pay the costs of the motion to stay the proceedings until security for costs be given. *E. E. Knox v. O'Brien* 62

3. Where a solicitor retains deeds, &c., claiming a lien for costs, this Court, upon the client's petition, may, by its inherent authority over its officers, refer the bill for taxation; and in case of more than one-sixth being taxed off, disallow the solicitor's costs of taxation, and order that the client's costs upon the taxation shall be deducted from the taxed costs, and that the solicitor shall deliver up the deeds, &c., upon payment of the balance—the Court declining to follow the decision in *Rogers v. Peterson*, 4 Mee. & Welsb. 588. *R. In re Lawyers* 102

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4. A solicitor furnished his bill to his client, and, after the expiration of the month allowed by the statute, commenced an action for the amount, the client having taken no step in the mean time. Afterwards, upon the client's petition, the action was stayed, and the costs were referred for taxation, the client undertaking to pay whatever should be the sum certified as due. Upon the taxation, more than one-sixth having been taken off, the Court ordered that the solicitor's costs of taxation should be disallowed, and also that the client's costs of the taxation, and of the application upon the return of the report, should be deducted from the amount of the taxed costs. *R. Power v. Nagle* 105

5. A solicitor must advance the sum payable to the Chancery fund on a bill of costs referred for taxation; but he will be entitled to have it and his other costs of taxation included in the sum certified on foot of the bill, in case it is not reduced by more than one-sixth. If more than one-sixth be struck off, he must bear all the costs of the taxation, the client's as well as his own. *R. Hodgins v. Wheeler* 323

III. After Abatement.

1. The plaintiffs had a decree for a sale, &c., but were thereby ordered to pay

the costs of W., who had disclaimed, and as to whom the bill was dismissed. Shortly after the decree, W. died before his costs had been taxed or furnished. The plaintiffs continued to proceed in the cause as if no abatement had taken place, and in two years after W.'s death obtained out of the produce of a sale under the decree, the full amount of their demand and costs. Subsequently W.'s administrator proceeded to have W.'s costs taxed, and the plaintiff's solicitor attended upon the taxation, but protested against the proceeding, as W. had died before taxation, and the suit had not been revived by or against his administrator. The Master, however, taxed the costs, and (after allowing the plaintiffs a certain time for raising their objection by an application to the Court, which they declined to make, but still insisted upon their objection) certified that he had done so in the presence of the plaintiff's solicitor, &c.; and thereupon W.'s administrator issued and served upon the plaintiffs a subpoena for the costs. The plaintiffs now moved to set aside the subpoena for irregularity:—*Held*, that the motion should be refused; and that it should have been refused with costs but for the case of *Averall v. Wade*, 1 Moll. 571, n., which it was declared ought not to bind this Court. *R. Barry v. Stawell*

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2. *Semble*.—The more proper course for W.'s administrator would have been, instead of issuing a subpoena, to have applied to the Court, after the taxation, for an order upon the plaintiffs to pay. As to the case of *Jupp v. Geering*, 5 Madd. 325—*Quære* *Ibid*
Affirmed on appeal, see infra 146
See next case.

3. In consequence of a controversy between the receiver and tenants under the Court, the latter came in and took a reference upon the subject at their own expense. After the proceedings under the reference had gone to a great length, it appearing that the Master would report in favour of the tenants, the parties in the cause, by consent, discharged the receiver, in order to prevent the report from being made up. The Court, under the circumstances, ordered the plain-

tiff and defendant to pay to the tenants all their costs of coming into Court, and of the reference, &c. Afterwards, a consent was entered into, and made a rule of Court, whereby the tenants waived the costs so ordered, upon the terms that the Master should be at liberty to continue the reference, notwithstanding the discharge of the receiver, and that the question of costs should abide the coming in of the report. Before the proceedings under the reference could be renewed, the suit abated by the death of the plaintiff, and the parties refused to revive the cause. There was now an application, under the circumstances, that the person entitled under the plaintiff's will to his interest in the cause, in respect of a valuable chattel real, which was the subject of the suit, and the defendant, or either of them, should pay to the tenants the costs formerly ordered, and those since incurred; *Held*, that the Court had not jurisdiction to make any order in the case. *R. Hutchins v. Hutchins* 217
And see note to this case 218
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IV. In Redemption Suits.

1. The costs of the suit, from the filing of the bill and the lodging of the money in Court were given in a redemption suit to the tenants; the defence relied on by the landlord being unfounded, and his conduct inequitable and oppressive.—*E. E. Newenham v. Mahon* 304
2. Decree for redemption without costs, the landlord having within the six months refused a tender of the rent and costs of the ejectment. *E. E. Fitzgerald v. Hussey* 319

V. In other Cases.

1. On dismissing the plaintiff's bill the Court will not give costs, where the defendant has imperfectly stated his case in his answer. *C. Steele v. Mitchell* 11
2. "The rule where it is sought to withdraw a co-plaintiff from the record is to require security for by-gone costs; but I do not see why I should require security for future costs, and therefore cannot follow the case in Beaven (*England v. Downes*, 1 Beav. 96) to that extent." *Per* Sir M. O'Loughlin in *Ring v. Nettles* 54

COSTS.

3. Costs given to the plaintiff in a case in which under other circumstances the defendant would be entitled to costs, because of the misconduct of the latter in the progress of the suit. E. E. *Scott v. Roosa* 170
4. Bill to foreclose a mortgage vested in trustees for the separate use of a *feme covert*. The husband, who was made a defendant, is entitled to his costs out of the fund. E. E. *Dillon v. M'Carthy* 192
5. Where lands are purchased by Commissioners under the 2 & 3 Vic. c. 61, for the purposes of the act, and the purchase-money is lodged in Court, the Court will, under the words "reasonable costs, charges and expenses," in the 29th section, award to the parties entitled, the costs necessarily incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject. R. *In re The Commissioners of the River Shannon* 355

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DEBTOR AND CREDITOR.

CREDITORS' SUIT.

See BANK AND BANKERS.
CONSENT.
COSTS, I.
EXECUTORS AND ADMINISTRATORS.

1. A creditor who, after final decree in a creditor's suit, applies for leave to file a charge under the decree to account, should state by affidavit either that he had no notice of the pendency of the suit, or if he had, should account for his not having filed his charge at the proper time under the decree. E. E. *O'Kelly v. Bodkin* 506
2. After final decree in a creditor's suit, the Court will not give permission to a person having a judgment affecting part of the estate decreed to be sold, to file a charge on foot of it under the decree to account, unless it appear that it is necessary for

DEBTOR AND CREDITOR. 7

the object of the suit that an account should be taken on foot of that judgment, or that the suit is so constituted that the same relief may be given in it as in an original suit instituted by the party applying. Therefore, where after final decree, a person applied for leave to prove a judgment affecting part of the lands decreed to be sold, under that portion of the interlocutory decree which directed an account to be taken of all charges and incumbrances affecting the real and freehold estates of the deceased, and it did not appear that it was necessary for the purposes of the suit that those lands should be sold, and the personal representative of the consor of the judgment was not a party to the suit, the Court refused the application. E. E. *Ibid*

CROSS BILL.

See EVIDENCE, IV., 1, 2.
PLEADING, I.—Bill, 1.

DEBTOR AND CREDITOR.

See BANK AND BANKERS.
COSTS, I.
CREDITORS' SUITS.
RECEIVER.

1. A creditor who, by lying by, permits the executor, having at the time assets for payment of debts, to pay a legacy, does not thereby lose his right to compel that legatee to contribute to the payment of his debt, if the executor subsequently waste the assets; but the assets of the defaulting executor must be first resorted to, and the insolvency of the executor not having been proved; *Held*, that the legatee was entitled to an inquiry upon the point, even after a decree to account, and a report under it. C. *Mannix v. Drinan* 108
2. A creditor by custodiam, on a judgment in a penal sum, obtained an order for the appointment of a receiver:—*Held*, that he was not entitled to interest beyond the penalty, which had accrued on the principal sum subsequent to the appointment of the receiver. E. E. *Barry v. Wilkinson* 121
See observations on this case *Ibid* 564
3. A judgment creditor, who has proved his demand under the decree to account, and who has been paid the sum decreed

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to be due to him, is bound to execute a warrant of attorney to satisfy the judgment, tendered to him on behalf of the inheritor of the estate decreed to be sold. E. E. *Eyre v. Lynch* 194

4. A creditor who does not come in regularly to prove his demand under the decree to account in a creditor's suit, but obtains an order for liberty to file a charge and obtain a separate report at his own expense, upon an affidavit stating that he was ignorant of the existence of the suit until after the decree to account was pronounced, and the report thereunder made, cannot rely upon the suit as being his from the beginning, so as thereby to avoid the bar of the 3, 4 W. 4, c. 27, s. 42. E. E. *O'Kelly v. Bodkin* 390
5. A judgment upon a bond in a penalty conditioned for the payment of a principal sum with interest, is "a sum of money charged upon or payable out of land or rent," within the meaning of the 42nd section of the 3, 4 W. 4, c. 27, and that statute bars the recovery of all arrears of interest thereon, which have accrued due more than six years next before the commencement of a suit instituted after the 31st of December 1833 to enforce payment thereof out of the land or rent *Ibid*
6. *Semble*—That the statute is a similar bar to the recovery of interest thereon, by a proceeding against the person or personal chattels of the debtor *Ibid*

DECISIONS DOUBTED.

1. The decision in the case of *Averall v. Wade*, 1 Moll. 571, n., is not one which ought to bind the Court.—*Per* Sir M. O'Loughlin, in *Barry v. Stawell* 24
2. The principle of the decision in *Jupp v. Geering*, 5 Mad. 325, was questioned, *Per* Sir M. O'Loughlin, in *Barry v. Stawell* 23
3. The case of *England v. Downes* (1 Beaven, 96), not to be followed, so far as to require security for future costs to be given, where it is sought to withdraw a co-plaintiff from the record. *Per* Sir M. O'Loughlin, in *Ring v. Nettles* 54
4. "I think it right also to guard myself against the supposition, that in *Burne v. Robinson* (1 Dru. & W., 658), I de-

DECISIONS DOUBTED.

- cided that the 40th section (of the 3 & 4 W. 4 c. 27) is not governed by the 25th section. Here the right to the principal was not in dispute; that had been established, and the only question was, as to the length of time for which the plaintiff was to have an account of interest; and I decided that there was no exception in the statute by which the case could be taken out of the provisions of the 42d section." *Per* Lord Plunket, in *Dillon v. Cruise* 82
5. The passage in *Daniel*, C. P. 87: "Strictly speaking, upon a demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause," would have been more correct if it had been directed more particularly to the case of a demurrer *allowed upon argument*. *Per* Sir M. O'Loughlin, M. R. in *Jefferyes v. Goodwin* 101
6. "I cannot adopt the reasoning, or follow the decision in *Rogers v. Peterson*" (4 Mee. & Welsb. 588). *Per* Sir M. O'Loughlin, in *In re Lawlers* 104
7. "I am not prepared to say that I should follow the case of *Hardwicke v. Mynd*. (Anst. 109) to its full extent." *Per* Lord Plunket, in *Mannix v. Drinan* 119
8. The decision of the Master of the Rolls as to the amount of interest payable upon a judgment, since the 3, 4 W. 4, c. 27, in *Kealy v. Bodkin* (1 Sausse & S. 211), was overruled in *O'Kelly v. Bodkin* 390
9. "In so far as *Berrington v. Evans* (1 Young & C. 474) overrules *Sterndale v. Hankinson* (1 Sim. 393), I have no hesitation in saying that it is wrong: for I have the judgment of this Court upon the ruling of the exceptions in this case, determining that *Sterndale v. Hankinson* is law notwithstanding the 3 & 4 W. 4, c. 27." *Per* Pennsfather, B., in *O'Kelly v. Bodkin* 392
10. "Grimstone's case (2 Amb. 705) was rightly decided, and its authority is not shaken by the observations of Sir A. Hart, in *Weld v. Tew*." (1 Beat. 270). *Per* Lord Plunket, in *Newcombe v. Newcombe* 414
11. The dictum of Sir W. McMahon, M. R., in *Leahy v. Arthur* (1 Hog 92), and the decision of Sir A. Hart, C

- in *Darcy v. Blake* (1 Moll. 274), as to the practice of not appointing receivers under the Mortgage Act, whenever the mortgage is controverted or impeached, will not be followed to their full extent.
- R. *Cosgrave v. Gannon* 433, 439
13. The case of *Head v. Massey*, (2 Moll. 467), overruled. *Per* Sir M. O'Loughlen, in *Hughes v. Nash* 495
14. See observations of the Court upon the case of *Barry v. Wilkinson*, ante, 121 in *Ibid* 564
15. See observations of Mr. Commissioner Macan upon the report of *Ex parte Bonham* (1 Deacon, 26). *In re Fahy* 588
16. See the observations of Sir Michael O'Loughlen, M. R., upon the case of *Power v. Shiel* (1 Moll. 312), in the case of *Heron v. Stokes*, 597
17. The cases of *Newton v. Greene*, (4 Sim. 141), and *Massey v. Parker* (2 M. & K., 174), are overruled by *Tullett v. Armstrong* (4 M. & C. 390), and *Scarborough v. Borman* (4 M. & C. 377). *Per* Pennefather, B., in *Marken v. Magrath* 570, 571

DECREE.

See EXECUTORS AND ADMINISTRATORS, 3, 8.

SOLICITOR, 3.

Whether a decree in a foreclosure cause against an infant defendant entitled to the equity of redemption, should give him a day to shew cause.—*Quære?*—*E. E. Jones v. Ham* 65
R. Flood v. Sutton 340
See note upon this subject in page 66.

DEEDS.

I. Generally.

Lien on for costs—See COSTS, II.

Priority of—See PRIORITY OF SECURITIES.

SALES JUDICIAL, I., 1, 2.

1. By a marriage settlement, freeholds and chattels real were settled upon the husband for life, with power to appoint by will among the children of the marriage, and in default of appointment the property was to be divided equally among the children; *Held*, that the shares of the children did not vest until the death of the husband. *C. Heron v. Stokes* 163

2. "This Court will reform or construe instruments so as to render them consistent with the manifest intention of the parties." *Per* Sir M. O'Loughlen, M. R., in *O'Leary v. Purcell* 344
3. The Bishop of D. being seized in fee in right of his Bishoprick, demised to J. S. for the term of twenty-one years, "All that territory of land called B., except all royalties, mines, minerals, quarries and turbaries; with liberty to dig, cut, save, and carry away the same: Provided always that J. S. and his under-tenants actually residing on the premises shall, notwithstanding the reservation or exception of turbaries, be permitted to cut, save and take as much turf each year during the demise, as may be sufficient for their firing, to be burned or consumed on the premises; but J. S., his executors, administrators or assigns, and his and their under-tenants, shall not by this proviso have any right to cut or save turf for their firing in other parts of the excepted turbaries, but such as shall from time to time be marked out for them by the Bishop of D." J. S. afterwards demised part of the lands so demised to him, to J. I. for the term of twenty-one years, with a *toties quoties* covenant for a renewal, by the description of "All that farm in B. which he purchased from R. B., and then, in his possession; excepting and always reserving out of this demise all royalties of what nature or kind soever, as the same are and may be excepted from time to time by the Bishop of D. and his successors from J. S., his heirs and assigns." When this demise was made, J. I. was in possession of a portion of bog, as part of the farm of B. which he had purchased from R. B. The estate of J. S. vested in J. D., who in the year 1835 acquired the inheritance in the lands under the provisions of the 3 & 4 W. 4, c. 37. By the conveyance of the fee, the Bishop of D. granted to him the lands as described in the lease to J. S., together with "all royalties, mines, minerals, bogs, mosses and turbaries." The estate of J. I. vested in his sons W. I. and J. I.—W. I. and J. I. having presented a petition for a conveyance of the inhe-

ritance in the lands demised to J. I., it appeared by the report of the Remembrancer that during the last fifteen years J. D. had used to give permission to his tenants, occupying other portions of the demised lands, liberty to cut turf for their own consumption on the portion of bog in the possession of W. I. and J. I.; and that the said under-tenants had cut turf accordingly, without any hindrance by W. I. and J. I. or the Bishop of D.: and that W. I. and J. I., and those from whom they derived, had at all times cut turf for their own consumption, and had given permission to such persons as they thought proper to cut turf on the bog in their possession, without any hindrance by the Bishop of D., J. S., or J. D. *Held*—first: that the soil of the bog in the possession of J. I. at the time when the lease was made to him, passed to him under that demise. E. E. *Irons v. Douglas* 601

4. Secondly.—That the petitioners were entitled to a conveyance of the inheritance in the premises demised by the lease to J. I.; and there ought not to be therein inserted a covenant that it should be lawful for J. D., his heirs or assigns, to direct any person residing on the territory of land called B., who had no bog within his holding, to resort to the bog in the possession of W. I. and J. I. for the purpose of cutting turf thereon; and that the persons so directed might cut and carry away such quantity of turf each year as might be necessary for their own consumption, without any hindrance by W. I. or J. I., their heirs or assigns *Ibid*

5. In the conveyance to the petitioners, the same general words were made use of as were contained in the conveyance from the Bishop of D. to the respondent *Ibid*

See *Dockrill v. Dolan* 552

II. Execution of.

See ATTACHMENT, 2.

1. *Semble*—That the Court has not jurisdiction, under the 1 W. 4, c. 47, s. 11, to order the Remembrancer to execute the deed of conveyance in the name of a minor defendant. E. E. *Tomb v. Orr* 64
2. A petition under the 1 W. 4, c. 47,

s. 11, should state the age of the minor. E. E. *Jones v. Ham* 65

3. *Semble*—That the 1 W. 4, c. 47, s. 10, applies to suits instituted before the passing of that act *Ibid*
4. An infant defendant, entitled to a portion of the equity of redemption of lands decreed to be sold in a foreclosure suit, was ordered to execute the conveyance to the purchaser *Ibid*

DEFENDANT.

See EVIDENCE, 2, 3.

PLEADING, III.—*Bill* 3.

DEMURRER.

See PLEADING—I., *Bill and III. Plea and Demurrer.*

DEVESEE.

See PLEADING, II., 4.

DISCLAIMER.

See PLEADING, III.—*Answer*, 4.

DISCOVERY.

See PLEADING, I.—*Bill*, 8.

DISMISSAL OF BILL.

See PLEADING, III.—*Bill*, 5.
COSTS, V., 1.

DOWER.

See HUSBAND AND WIFE.

The doctrine that a purchaser may defeat the title of the wife of the vendor to dower, by obtaining a conveyance of a prior outstanding term, with notice of her title, is not to be extended. *Per Brady, C. B., in Kent v. Roberts* 297, 298

ECCLESIASTICAL PERSONS AND THINGS.

See INJUNCTION, 4.

WASTE.

EJECTMENT.

See LANDLORD AND TENANT, II., 1.

EMBLEMENTS.

See TENANTS UNDER THE COURT, 1, 2.

ESTATE.

1. "The doctrine of *Taylor v. Stibbert* (2 Ves. jun. 440) is this, that if a tenant for life makes leases not warranted by his power, a party purchasing from him with notice of those leases, shall not be permitted afterwards to evict them, and thereby render the assets of the tenant for life liable for that eviction." *Per Lord Plunket, in Steele v. Mitchell* 11
2. Tenant for life confesses a judgment, is afterwards discharged as an insolvent, and then dies—the Court has jurisdiction, under the 5 & 6 W. 4, c. 55, after his death, to make absolute as against his assignees a conditional order for extending a receiver obtained in the lifetime of the insolvent, upon a petition against him, so far as to give effect to the lien of the petitioner on the life estate, and the rents received by the receiver thereout, and the purposes necessarily connected therewith. *E. E. Barry v. Wilkinson* 121
See observations on this case *Ibid* 564
3. By a marriage settlement, freeholds and chattels real were settled upon the husband for life, with power to appoint by will among the children of the marriage, and in default of appointment the property was to be divided amongst the children:—*Held*, that the shares of the children did not vest until the death of the husband. *C. Heron v. Stokes* 163
4. Testatrix devised all her freehold and leasehold estates to A. for life, remainder to B. for life, remainder (except as to a certain rent) to the Commissioners of Charitable Donations and Bequests, upon trust, to renew leases and apply rents, &c., and appointed A. and B. executors of her will:—*Held*, that A. and B. took beneficial estates respectively for life. *R. Commissioners of Charitable Donations v. Espinasse* 324

EVIDENCE.

I. Generally.

1. Under 1 & 2 Vict. c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards in respect of the tithe rent-charge, and who have given notice in the manner specified by the act, Quarter Sessions may vary the rent-

charge according to the price of corn. An order reducing the rent-charge, recited that whereas due notice having been first by them given, three owners and occupiers of land in the parish of F., &c., each charged with payment of £3 and upwards in respect of the rent-charge, payable in lieu of the composition for tithes made by certificate of, &c., applied to the Justices of the Peace at Quarter Sessions, &c. Afterwards the Incumbent proceeded by petitions under the 30th section of the act, to recover the rent-charge which accrued from the gale day after the order of Sessions, as if no reduction had taken place, and a rule *Nisi* for a receiver having been obtained, the respondent came in to shew cause against it, relying upon the order of the Quarter Sessions: *Held*, that the recitals in the order were not evidence of the facts thereby stated. *R. Thompson v. Sheil* 135

2. To an *habere* upon a judgment in ejectment for non-payment of rent, the Sheriff returned that he had delivered possession upon a particular day: *Held*, in a redemption suit, that the return was not conclusive evidence, against the tenant, of the date of the execution of the *habere*. *E. E. Fitzgerald v. Hussey* 319
3. If evidence be conclusive at law, it must be equally conclusive in equity.—“We will not establish a rule of evidence, sitting as a Court of Equity, which, sitting as a Court of Law, we would reject. The rules of evidence are substantially the same at law and in equity. What do you say to the case of *Gyfford v. Woodgate*, (11 East. 297)? Have you any case overruling or varying that case; or any case denying the principle, that on a collateral matter, not an essential part of the return, and which the Sheriff is not by the writ commanded to return, the Sheriff's return is only *prima facie* and not conclusive evidence?”—*E. E. Per Curiam in Ibid* 321

II. Admissions.

1. A bill of revivor against the executor of a deceased party, prayed that he should either admit assets, or for an account.—The executor admitted assets sufficient to answer the plaintiff's demand, if any,

he being advised that the plaintiff had not any demand against the assets. *Held*, not a sufficient admission of assets; and that an account should be directed.—
E. E. *M'Tiernan v. Bell* 193

2. Whether evidence of conversations with the parties, or those under whom they claim, which are not specifically put in issue by the pleadings, will be received, is a question to be decided according to the circumstances of each case, and there is no inflexible rule on the subject.

The Incorporated Society v. Rose 257

3. An admission in the answer, that the defendant's solicitor wrote a letter "to some such effect as that in bill stated: but for certainty as to the contents thereof the defendant begs leave to refer thereto when produced and proved," does not authorise the plaintiff to read the passage in the bill referred to, in order to shew what were the contents of that letter. E. E. *Kent v. Roberts* 279

4. The respondent, in the affidavit made by him to shew cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment, was a certain specified sum exceeding the amount of the principal sum mentioned in the bond, and six years' interest thereon, and did not rely on the 3 & 4 W. 4, c. 27, s. 42, as a bar; *Held*, that a report finding that the principal money, with six years' interest thereon, only was due on foot of the judgment, was erroneous, it being contrary to the admission in the affidavit.—
E. E. *Tristram v. Harte* 386

III. Competency of Witness.

1. Where it appears upon the deposition of a witness that he is incompetent by interest, the Court will not, except in a very clear case, permit him to be re-examined for the purpose of shewing that the allegation by which his interest appeared was by mistake. R. *Smith v. Harding* 336
2. The plaintiff is entitled as of course to examine a defendant as a witness, waiving all just exceptions. There is now a side-bar rule for the purpose. R. *Watson v. Pin* 344
3. Whether a plaintiff examining a defendant as a witness waives all relief as

against him, or only that portion of relief to be given in respect of the matters to which the defendant is examined?—
Quære. *Ibid*

4. A witness incompetent by interest at the time of his examination, after a release, ordered to be re-examined before publication, it appearing to the Court that there was no intention of varying the evidence already given. R. *Gleeson v. Earl of Sandwich* 359

5. Where the lessee of a lease of lives renewable for ever became insolvent, and died, and a judgment creditor of his filed a bill and obtained a decree for sale of the land, and with the sanction of the Court in that suit files a bill for a renewal; *Held*, that a judgment creditor of the party entitled to the lease, is a competent witness for the plaintiff. C. *Smith v. Shannon* 452

IV. Practice as to.

1. If the plaintiff in the cross-cause have not been guilty of *laches*, it is almost of course to respite publication in the original cause, so that there may be but one examination, and that both causes may be heard together. E. E. *Manders v. Manders* 63
2. Publication in the original cause respited until full answers put in by the defendants in the cross-cause; though the sole plaintiff in the original cause was ready to file his answer at once, and could not compel the other defendants to answer: the plaintiff in the cross-cause undertaking to proceed with effect to enforce their answers *Ibid*
3. Upon a former occasion, the defendant moved to suppress all the depositions, on the ground that the interrogatories were not entitled to the cause. The Court made no rule on the motion, on the plaintiff producing the witnesses to be re-sworn; the plaintiff to be at liberty to amend the title of the interrogatories; and in default of his producing such witnesses, within a limited period, the depositions of such witnesses to be suppressed. The witnesses were re-sworn to the depositions to the former interrogatories. The defendant then moved to suppress a deposition, on the ground that the interrogatory was leading; *Held*,

that he had pretermitted his time for making the objection. *E. E. O'Hara v. Creagh* 179

4. Documents not under seal cannot be proved *vivâ voce* at the hearing of the cause, as exhibits in this Court; the practice in Chancery is otherwise *Ibid*
5. In this Court "the only documents which are permitted to be proved as exhibits at the hearing, are instruments under seal, which are unimpeached, and where nothing but handwriting is to be proved." *Per Richards, B., in Ibid*
6. An application merely that a witness may be re-sworn to his depositions, may properly be before publication; but where it is sought that the witness shall be re-examined for the purpose of contradicting or varying his own previous evidence, the application must be after publication, as in such case the Court must have the opportunity of looking into the depositions. *R. Gleeson v. Earl of Sandwich* 359

EXECUTION OF DEEDS.

See ATTACHMENT, 2.
DEEDS, II.

EXECUTORS AND ADMINISTRATORS.

See COSTS, I., 1, 10.

EVIDENCE, 1.

PLEADING, I.—*Answer*, 2.

SALES JUDICIAL, I., 7, 8, 14.

1. A simple contract creditor, who institutes a suit for the administration of personal assets, and seeks to have his costs as against judgment and specialty creditors who may come in under the decree, ought to make a case for it by his bill and shew that a suit was necessary for the due administration of the assets, and payment of his debt; or else that by his exertions, he has made a fund available which would otherwise have been lost. *E. E. Drake v. Forde* 56.
2. The conusor of a judgment by his will in 1802 bequeathes certain leaseholds specifically, and appoints the conusee a trustee under his will. The executor assents to the bequest in 1808, having at the time assets for the payment of all debts of the testator. A suit is instituted in 1812 for a sale of part of the testator's property by a specific en-

cumbrancer, and under the decree in that cause, the judgment is found, and declared a charge on the premises. No sale takes place, and after the death of the conusee in 1822, his widow, who was entitled to the judgment under a settlement which gave the conusee a life interest in it, files her bill to raise the amount, which she amends in 1835, making parties the specific legatee, his wife and children, upon whom the chattel had been settled by a post-nuptial settlement: *Held* that she was entitled to compel the owner of the chattel to contribute to the payment of the judgment. *C. Mannix v Drinan* 108

3. A decree in a suit instituted against an executor by a simple contract creditor of the testator for payment of his own debt merely, directing the executor to pay out of the assets of the testator, does not give any priority over outstanding specialty creditors, of whose debts the executor has notice. Such a decree is analogous to a judgment at law of assets, *quando acciderint*. *C. Sandford v. Seymour* 212
4. By marriage articles, the intended husband covenanted with the trustees that a certain sum of money should be vested in the trustees and the survivor of them and the executors and administrators of such survivor for ever, upon the trusts specified in the articles. The marriage was celebrated, and the husband, with the assent of the trustees, obtained possession of the money; *Held*, in a suit for the administration of the assets of the husband, that the trustees were entitled to rank as specialty creditors of the husband, in respect of that sum of money. *E. E. Jameson v. Farrer* 346
5. By marriage settlement, a sum of £5000 was vested in trustees upon trust to permit the wife, in case she should survive her husband, to receive the interest thereof during her life; and in case there should be no issue of the marriage, in trust for the husband absolutely: with power to the trustees, with the consent of the husband and wife, to invest the money in Government or on real security. The money was afterwards, with the consent of the husband and wife, lent upon mortgage. The husband died with-

out issue; and by his will, bequeathed his interest in the £5000 to A. upon certain trusts, and appointed him his executor. The wife afterwards married B.; and upon her marriage, the interest on the 5000 was assigned to A. upon trust to pay the yearly interest on the £5000 to the wife for life; and A. covenanted with the wife that he, his executors, &c., would stand possessed of the premises assigned to him upon the trusts therein mentioned. The £5000 was paid to A. out of the produce of a sale had in a suit in which he was a defendant: and A. represented to B.'s wife that he had invested the money upon Government security; and paid her interest according to the rate it would have borne if it had been so invested. The money was not in fact so invested, but was applied by A. to his own use.—*Held*, in a suit for the administration of A.'s assets, that the new trustee of B.'s last marriage settlement was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the £5000 calculated at £6 per cent;—and also (there being a deficiency of the assets to pay the £5000, which was a debt by simple contract), as a specialty creditor for any future deficiency in the interest, calculated at £6 per cent.

Ibid

6. Costs of the suit given to the plaintiff, a simple contract creditor, in priority to the demands of judgment and specialty creditors; the suit being necessary, and having been properly conducted *Ibid*
7. In a judgment creditor's suit for administration of assets (the Master having reported that the personal estate was of little value, and a mortgage debt, part thereof, as irrecoverable), the final decree directed a sale of the real estate for payment of judgment debts, according to priority. There were sixteen judgments; and the produce of the real estate was applied in paying off the three earliest, and the balance was paid towards satisfaction of the fourth. Afterwards the mortgage debt, part of the personal estate, was unexpectedly realised, and the amount having been transferred to the credit of this cause, but

being a very deficient fund, the Master allocated it rateably, giving the fourth judgment creditor his rateable share upon the unpaid portion of his demand. The latter insisted that the personal assets should have been administered rateably in the first instance, and therefore, that a portion of them equivalent to the shares which the three prior creditors ought to have received, should now be allocated as the produce of real estate—not rateably, but according to priority; and having moved to send back the report upon this ground, the Master of the Rolls overruled the objection and confirmed the report—adopting the principle of the decisions in *3 P. Wms. 322—344, n. R. Avarrell v. Wade 446 confirmed on appeal—See note* 451

8. In a suit for an account of an intestate's personal estate the bill sought to charge the administrator with wilful default, and contained charges to that effect. The decree directed only the ordinary accounts; *Held*, that nevertheless the Court would direct an inquiry as to wilful default, if on the Master's report there appeared facts to warrant it. *C. Cuffe v. Cuffe* 469
9. The 204th Rule does not take away the discretion of the Court as to the rate of interest to be charged upon balances in the hands of executors, administrators, &c. *Ibid*
10. A purchaser under the decree of the Court was discharged upon a report of bad title; and it was ordered that his deposits be paid back to him without prejudice to his applying for the interest thereon and his costs when there should be a fund in Court; he died before either the costs were taxed or a fund for their payment was realised. *Held*, that on a fund being afterwards realised, his personal representative was entitled to be paid thereout the interest and costs. *E. E. Mackay v. Orr* 499
11. In a suit for the administration of assets, the report, but not the bill, made a case for charging the executor with interest upon balances in his hands; *Held*, that the proper mode in which to bring the question before the Court was to present a petition stating the

EXECUTORS, &c.

special matter, and praying that the cause might be set down to be heard for further directions. *E. E. Cleary v Cleary* 562

FIERI FACIAS.

See PRACTICE, 4.

FRAUD.

1. The clerk of the defendant effected an insurance upon his own life, one of the conditions of the policy being, that no person should effect an insurance upon the life of another, in whose life he was not interested; and shortly afterwards assigned the policy to the defendant, in consideration of the defendant paying the expenses of the insurance, and giving him an increased weekly salary while in his employment. The defendant was interested in the life of the clerk. In three weeks afterwards, the defendant dismissed the clerk from his employment without sufficient cause; and the clerk having died, his executor filed a bill against the defendant and the Directors of the Insurance Company, to set aside the assignment as having been obtained by fraudulent means, and for payment. The Directors did not contest the liability of the Company, but paid the amount of the policy into Court, and were thereupon struck out of the bill. The case set up by the defendant, but not clearly proved, was, that the policy was effected wholly for his benefit, although in the name of his clerk:—*Held*, that the plaintiff was entitled to the relief prayed, on the terms of paying to the defendant the sums paid by him for effecting the policy and premiums, with interest. *E. E. Scott v. Roose* 170
2. Costs given to the plaintiff because of the misconduct of the defendant in the progress of the suit *Ibid*

FUND IN COURT.

See SEQUESTRATION, 1.

GENERAL ORDERS.

See RULES AND ORDERS.

GIFT.

See WILL, 1.

GRAND CANAL COMPANY

See AGREEMENT.

INFANT.

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HEARING.

See EVIDENCE, IV., 4, 5.
PRACTICE, 4.

HEIR-AT-LAW.

See LUNACY.

HUSBAND AND WIFE.

See COSTS, V., 4.

DOWER.

ESTATE, 3.

EXECUTORS AND ADMINISTRATORS, 5, 6.

PLEADING, III.—*Bill, 1.*

WILL, 1, 4, 5.

1. Bill to foreclose a mortgage vested in trustees for the separate use of a *feme covert*. The husband, who was made a defendant, is entitled to his costs out of the fund. *E. E. Dillon v. McCarthy* 192
2. A consent in the case that one-fourth of £500, to which a *feme covert* was entitled, be paid to her and to her husband, was made a rule of Court, without the *feme* being examined to waive her equity. *E. E. Loughney v. Lahiffe* 511
3. Equity will execute a contract in bar of dower entered into before marriage by an adult woman not under disability, where such contract is reasonable, although by its terms the lady, being left a widow, has no provision out of her husband's property, and the provision made for her out of her own is insufficient to support her in her rank of life. The Court, however, will see that the widow gets what she contracted for in lieu of dower. *R. In re Herons, minors* 589
4. Equity makes no distinction between the right of dower and other rights, and does not extend any more favour to one than to another, but equally protects all. The decision and the *dicta* in *Power v. Shiel* (1 Mol. 296) considered *Ibid*

INCUMBRANCERS.

See COSTS, I., 7, 9, and II., 1.
LIMITATIONS, STATUTE OF, 3.

INFANT.

See DEEDS, II., 1.

1. A petition under the 1 W. 4, c. 47, s.

- 11, should state the age of the minor. E. E. *Jones v. Ham* 65
- 2 *Seemle*, that the 1 W. 4, c. 47, s. 10, applies to suits instituted before the passing of that act *Ibid*
3. An infant defendant, entitled to a portion of the equity of redemption of lands decreed to be sold in a foreclosure suit, was ordered to execute the conveyance to the purchaser *Ibid*
4. The decree did not give him a day to shew cause against it, on his coming of age *Ibid*
See the note as to this, in page 66, and Flood v. Sutton, 340.
5. A commission of perambulation for settling boundaries cannot be obtained by petition under the 5 G. 2, c. 9, when there are minors interested. C. *In re O'Brien* 161
6. The affidavit of service of petition did not state that the persons served were the only persons in possession of these lands, which the Court considered a fatal defect *Ibid*
7. Under the 1 W. 4, c. 47, s. 11, an infant defendant entitled to the equity of redemption of lands decreed to be sold in a foreclosure suit, was ordered to execute the conveyance to a purchaser under the decree, although the decree gave the infant a day to shew cause against it, upon his coming of age. R. *Flood v. Sutton* 340
8. Whether the decree should have given the infant a day to shew cause—*Quare*. *Ibid*
9. See the observations of Lord Cottenham, as to the question how far a party who was an infant at the time a decree was pronounced, is entitled, in certain cases, upon attaining full age, to be let into a new defence—in *Malone v. Malone* 546-7
10. Upon a reference to inquire as to the ages and fortunes, &c., of three infants, and to appoint guardians, the Master reported that they were respectively of the ages of five years, three years, and two years; that their mother would be the proper guardian of their persons, and that two of them being females, were entitled to a certain property, out of which £10 per annum should be allowed for the maintenance of each; that the

third, being a boy, was entitled as the heir-at-law to the freehold estates of which his late father was seized in possession, subject to his mother's right of dower thereout, and that £100 per annum would be a proper allowance for his maintenance. The Court having allowed an objection to the finding as to the right of the minor's mother to dower, upon the ground that she was barred of dower by her settlement, increased the allowance for the maintenance of the male infant from £100 to £150 per annum. R. *In re Herons, minors.* 589

INJUNCTION.

See BANK AND BANKERS, 2.

PLEADING, III.—*Answer 2.*

1. An application for an injunction to put out of possession a tenant under the Court, the cause having suddenly terminated, must be on notice to the tenant who is in the nature of a tenant at will, and is entitled to emblements. E. E. *O'Connor v. O'Callaghan* 199
2. A motion to continue an injunction upon equity confessed by the answer, without any saving of the right to except is a waiver of all objections to the answer for insufficiency. R. *Crofts v. Lord Egmont* 229
3. Injunction granted upon the application of the receiver, to restrain one tenant of the estate from quarrying upon a private road, part of the premises, and which was common to all the tenants. E. E. *Dorman v. Dorman* 385
4. Application by a parishioner for an injunction to restrain a Rector from encroaching upon the church-yard and parish burial-ground, without any faculty or license from the Ordinary for that purpose, by building a school-house thereon, refused,—it appearing, that although no faculty had been formally obtained, the Bishop was in fact a consenting party, and that from the condition of the proposed site, no irreparable injury could be done; the Ecclesiastical Court having the proper authority, *ratione loci*, to have the building removed, if unlawfully erected, and to punish the person guilty of erecting it. R. *Earl of Fitzwilliam v. Moore* 615

INSOLVENT.

INSOLVENT.

See ESTATE, 2.

PLEADING, I.—*Bill*, 9.

INSURANCE AND INSURANCE COMPANY.

See FRAUD.

SERVICE, 2.

"I admit that it is competent, in this country, for a person to effect an insurance on the life of another, in whose life he has no interest; for there is no act in force in Ireland similar to that in England, which prohibits wagering policies; and certainly it is also competent for one person to accept from another an assignment of a policy, which the latter has effected upon his own life; but in forming an opinion of the equitable claims arising out of such a transaction, the Court must look at all the circumstances of the case: and it is not too much to require a party, who seeks the benefit of a transaction of doubtful policy in the eye of the law—and which, in this particular case is virtually prohibited by the terms of the policy of insurance itself—to shew clearly and satisfactorily that he has in the fairest manner obtained the assignment of the policy from the party effecting it." *Per Brady, C. B.*, in *Scott v. Roose* 173

INTEREST, PECUNIARY.

See EXECUTORS AND ADMINISTRATORS, 10, 11.

SALES, JUDICIAL, I., 3, 9, 13, 14.

1. A creditor by *custodiam*, on a judgment in a penal sum, obtained an order for the appointment of a receiver: *Held*, that he was not entitled to interest beyond the penalty, which had accrued on the principal sum subsequent to the appointment of the receiver. *E. E. Barry v. Wilkinson* 121
See this case observed upon, in *Ibid* 564
2. Where judgment has been entered upon a bond in a penalty conditioned for the payment of a principal sum with interest, the 3 & 4 *W. 4*, c. 27, s. 42, bars the recovery of all arrears of interest thereon, which have accrued due more than six years next before the commencement of a suit instituted after the 31st of December 1833, to enforce payment

JUDGMENT, &c.

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thereof out of land or rent. *Semble*—that the statute is a similar bar to the recovery of interest thereon, by a proceeding against the person or personal chattels of the debtor. *E. E. O'Kelly v. Bodkin* 390

3. The 204th rule does not take away the discretion of the Court as to the rate of interest to be charged upon balances in the hands of executors, administrators, &c. *C. Cuffe v. Cuffe* 469
4. Assignee not chargeable with penal interest for the detention in his hands of monies of the estate, if direction was not given under the 49 *G. 3*, c. 121, ss. 3, 4, and under the 122nd section of the 6 *W. 4*, c. 14, by the creditor or Commissioner to lodge such monies in bank. *B. In re Fahy* 585

INTEREST OF WITNESS.

See EVIDENCE, III., 1, 3, 5.

ISSUES AT LAW.

As to the practice of Courts of Equity in directing issues—see the judgment of Lord Cottenham, C., in *Malone v. Malone* 536

JOINT AND SEVERAL BOND.

See BOND.

JOINT STOCK COMPANIES.

See AGREEMENT.

BANK AND BANKERS.

PLEADING, I.—*Bill* 2.

JUDGMENT AND JUDGMENT CREDITORS.

Generally.

See DEBTOR AND CREDITOR.

EXECUTORS AND ADMINISTRATORS.

As to costs in Creditors' Suits.

See COSTS, I.

As to interest on judgments.

See INTEREST, PECUNIARY.

How affected by length of time.

See LIMITATIONS, STATUTE OF.

Priority of.

See PRIORITY OF SECURITIES.

Receivers on Judgments.

See RECEIVER, II.

Satisfaction of Judgments.

See SALES JUDICIAL, I., 6, 7, 8.

JUDGMENT QUANDO ACCIDERINT.

See EXECUTORS AND ADMINISTRATORS, 4.

See COSTS, III.

LIMITATIONS, STATUTE OF, 2.

JURISDICTION.

1. An agreement for the payment of a personal annuity for the joint lives of A. and B. will be specifically performed, and the defendant directed to pay it, on the ground that there is no adequate remedy at law. *C. Swift v. Swift* 267
2. "A number of cases have been cited on both sides, and the result of them all is, not that wherever there is a remedy at Law, relief will be refused in Equity; but that when the relief at Law is equally beneficial and equally effectual with that which may be obtained in Equity, there the Court will refuse to interfere. Upon that ground, where an annuity is charged on land, although there is a remedy at Law, yet as a Court of Equity alone can give the appropriate relief, by the appointment of a receiver, a bill for that purpose will be entertained." *Per Lord Plunket, in Ibid* 275
3. "All these cases, I think, shew, that notwithstanding the dismissal of the bill, the Court may, in a case like the present, make an order on the plaintiff touching his recognizance; and the remaining question is, whether I ought to make such an order upon him as that which has been applied for." *Per Sir M. O'Loghlen, M. R. in O'Leary v. Purcell* 332
4. When a plaintiff claims to be entitled to a property under an alleged trust in a will, created for those filling a certain character, which he alleges that he sustains, it is in the discretion of the Court whether it will first decide the question whether there is any such trust, or put the petitioner to establish the character in which he sues in the first instance. *Dom. Proc. Malone v. Malone* 536
5. In ordinary cases, the proper course is to ascertain the question of fact in the first instance *Ibid*

LACHES.

See LIMITATIONS, STATUTES OF.

LANDLORD AND TENANT.

See COSTS, IV.

EVIDENCE, I., 2.

PLEADING, I.—*Bill*, 1.

I. *Landlord's Rights.*

1. The Court, upon a motion on behalf of a landlord, for liberty to proceed at law, notwithstanding the appointment of a receiver, will not enter into any question of equities between the landlord and tenant, but will, in a proper case, refer it to the Master, to inquire and report whether any proceedings should be taken in defending the ejectment, or in relation thereto. *R. Cramer v. Griffith* 230
2. The lessee of See lands, held under a lease with a *toties quoties* covenant for renewal, demised part thereof as building ground for a similar term; and the sub-tenant covenanted not to carry on certain trades upon, or to throw dirt into the avenue in front of the demised premises, during the term; and that in case he, his executors, administrators or assigns did so, he and they would pay an increased rent as a penalty:—*Held*, upon a petition by the sub-tenant against his landlord for a conveyance of a perpetual estate in the lands pursuant to the 6 & 7 W. 4, c. 99, that the conveyance of the fee should contain covenants on behalf of the sub-tenant, his heirs and assigns, with the lessee, his heirs and assigns, similar to those in that behalf contained in the *toties quoties* lease to the sub-tenant; although neither the conveyance of the fee nor the lease to the sub-tenant, contained such covenants. *E. E. Dockrill v. Dolan.* 552

II.—*Tenant's right to redeem.*

1. A landlord brought an ejectment for non-payment of rent against his tenant, and a mortgagee of the tenant's interest; and having recovered judgment, executed his *habere*. The tenant did not redeem the lands within six months after the execution of the *habere*; but after the expiration of that period, and within the nine months allowed the mortgagee to redeem, the latter informed the landlord that he was ready to redeem the premises, and to pay him the rent and costs. The landlord dispensed with a tender of the rent and costs being made to him;

but in order to prevent a redemption of the premises, by the mortgagee, entered into an agreement with him, within the period of the nine months, to pay him the sum due to him on foot of the mortgage, and take an assignment thereof, and to release him from the arrears of the rent, to the payment of which he was legally liable. That agreement was carried into execution by a deed of assignment bearing date within the period of the nine months, although actually executed after their expiration. The landlord subsequently sued the tenant for the arrears of the rent, and for the mortgage debt.—*Held*, on a bill filed by the tenant after the expiration of the nine months, that he was entitled to redeem the premises. *E. E. Kent v. Roberts*

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2. "In my opinion, even if there had not been any tender of the rent and costs, neither the landlord nor the mortgagee had a right to buy or sell the privilege of redemption; and I found that opinion upon principles of public policy. If such dealings were allowed by the law, no mortgagee would redeem mortgaged premises evicted for non-payment of rent. He would, manifestly, prefer being paid his demand by the landlord; who might recover the sum so paid by suing on foot of the mortgaged securities." *Per Brady, C. B., in Ibid*

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3. "The decree in *Fetherstone v. O'Reilly* (4 Bli. P. C. 161), establishes this principle—that after the mortgagee has done all that was necessary to effect a redemption of the premises, (after an eviction for non-payment of rent) the landlord shall not interfere to prevent the exercise of that right of redemption by him, to the prejudice of those who might be benefited by it—that there is that in the relation of mortgagor and mortgagee, and landlord and tenant, that the landlord shall not be permitted to take advantage of his situation, or interfere to prevent the exercise of the right to redeem, which the mortgagee has established. That right, if exercised, enures to the benefit of the tenant." *Per Pennefather, B., in Ibid*

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4. The litigious conduct of a tenant in defending an ejectment for non-payment

of rent, does not disentitle him to relief upon a bill for redemption; nor to the costs of that suit, if he be otherwise entitled to them. *E. E. Newenham v. Mahon*

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5. A decree for a redemption pronounced against a landlord, with costs; his defence being unfounded, and his conduct in refusing information to enable the tenant to redeem, inequitable and oppressive *Ibid*

6. *Semble*: that if there be two leases of different premises from the same landlord to the same tenant, and the landlord evict the tenant from both for non-payment of rent, the tenant may redeem the one, and not the other *Ibid*

7. Acts of waste committed by a tenant do not disentitle him to redeem *Ibid*

8. Decree for a redemption without costs; the landlord having, within the six months, refused a tender of the rent and costs of the ejectment. *E. E. Fitzgerald v. Hussey*

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LEASE.

See DEEDS.

LANDLORD AND TENANT, I., 2, AND II., 6.

POWERS.

LEGACIES AND LEGATEES.

1. The conusor of a judgment, by his will in 1802, bequeathes certain leaseholds specifically, and appoints the conusee a trustee under his will. The executor assents to the bequest in 1808, having at the time assets for the payment of all debts of the testator. A suit is instituted in 1812 for a sale of part of the testator's property by a specific encumbrancer, and under the decree in that cause, the judgment is proved, and declared a charge on the premises. No sale takes place, and after the death of the conusee in 1822, his widow, who was entitled to the judgment under a settlement which gave the conusee a life interest in it, files her bill to raise the amount, which she amends in 1835, making parties the specific legatee, his wife and children, upon whom the chattel had been settled by a post-nuptial settlement:—*Held*, that she was entitled to compel the owner of the chattel to contribute to the payment of the judgment. *C. Mannix v. Drinan*

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2. A creditor who, by lying by, permits the executor, having at that time assets for payment of debts, to pay a legacy, does not thereby lose his right to compel that legatee to contribute to the payment of his debt, if the executor subsequently waste the assets; but the assets of the defaulting executor must be first resorted to, and the insolvency of the executor not having been proved:—*Held*, that the legatee was entitled to an inquiry upon the point, even after a decree to account, and a report under it. *C. Ibid.*

LIEN.

See COSTS, II., 3.
SOLICITOR, 3.

LIMITATIONS, STATUTE OF.

See MASTER AND REMEMBRANCER, &c. 2.

1. Where a trust is created by will for the payment of debts, the right of a judgment creditor to the benefit of that trust is not affected by the 40th section of the 3 & 4 *W. 4*, c. 27. *C. Dillon v. Cruise* 70
2. "I certainly would hesitate long before I would set up my own opinion against the authorities I have referred to. The ground upon which they, the cases of *Kelly v. Kelly* (6 L. R. N. S. 222), *Jones v. Scott* (1 Russ. & M. 255), and *Phillipo v. Munnings* (2 My. & Cr. 309), proceed is this—that the inherent jurisdiction of Courts of Equity to prevent the rights of a party from being prejudiced by their own acts, or by the acts of the persons against whom those rights are sought to be enforced, is not taken away by the Statute of Limitations."—*Per* Lord Plunket, in *Ibid* 83, 84
3. "The Statute of Limitations may be a very just defence where it proceeds upon a presumption of payment; but in order to entitle himself to the benefit of it, a party must set it up at the proper time; and I cannot now, at this stage of the suit—(the bill had been taken *Pro confesso* against the defendant, and a decree in 1837 to account directed, and a report under that decree, exceptions to which were now before the Court)—set up such a defence for a party who has neglected to avail himself of it when

he had the opportunity. But then, it is said, although he is concluded, his children, who are minors, are not, and that they can seek the benefit of the statute. I think that neither is it open to them to do so. The minors appeared in the cause—their trustee was a party to the suit; and as the bar of the statute was not relied on in their behalf at the original hearing, it cannot be resorted to now. In my opinion, the mouths both of the father and of the children are closed by the decree of 1837, and neither of them can resist the right of the plaintiff to the relief which that decree gives her." *Per* Lord Plunket, in *Mannix v. Drinan* 118

4. A creditor by judgment of Hilary Term 1813, filed a bill in 1837, against the heir and personal representative of the consor, for payment of the judgment. The heir, who was also the personal representative of the consor, by his answer, relied upon the 3 & 4 *W. 4*, c. 27, s. 40. The judgment had not been revived, nor was any payment on account of the principal or interest thereof made, or any acknowledgment in writing of the right of the plaintiff thereto given, by the consor or his real or personal representative, subsequent to the rendition thereof. The bill was dismissed with costs. *E. E. O'Hara v. Creagh* 179
5. Where a judgment has been obtained upon a bond in a penalty conditioned for the payment of a principal sum with interest, the principal sum is "a sum of money charged upon or payable out of land or rent" within the meaning of the 3 & 4 *W. 4*, c. 27, s. 42: and that statute bars the recovery of all arrears of interest thereon, which have accrued due more than six years next before the commencement of a suit instituted after the 31st of December 1833, to enforce payment thereof out of land, or rent; the case not being within any of the exceptions mentioned in the 42nd section. *E. E. O'Kelly v. Bodkin* 390
6. *Semle*—That the statute is a similar bar to the recovery of interest thereon by a proceeding against the person or personal chattels of the debtor *Ibid*
7. A creditor who does not come in regularly to prove his demand under the

decree to account in a creditor's suit, but obtains an order for liberty to file a charge and obtain a separate report at his own expense, upon an affidavit stating that he was ignorant of the existence of the suit until after the decree to account was pronounced and the report thereunder made, cannot rely on the suit as being his from the beginning, so as thereby to avoid the bar of the 3 & 4 W. 4, c. 27, s. 42. *Ibid*

LIS PENDENS.

See CREDITORS' SUITS, 1.

PLEADING, I. *Bill*, 7, II., 1, &

III. *Demurrer & Plea* 2.

PRIORITY OF SECURITIES.

RECEIVER, I., 5.

LUNACY.

The committee and heir presumptive of a lunatic, who was absolute owner of a freehold estate subject to a charge of £900, paid off the charge out of his own monies, and had it assigned to a trustee for him. He subsequently applied to the Court for leave to apply the surplus rents of the estate towards payment of the charge; but there were then judgments affecting the lunatic personally, and the application was refused. When the judgments were paid, the committee, in the lifetime of the lunatic, paid off the charge out of the surplus rents, without any order, but was allowed the amount in passing his account: *Held*, that between the heir and the next of kin of the lunatic, the latter had no equity to have it kept alive for their benefit. C. *Newcombe v. Newcombe* 414

MASTER AND REMEMBRANCER AND THEIR REPORT.

See DEEDS, II.

INFANT, 10.

PLEADING III., *Demurrer and Plea*, 2.

1. "Where the Master stating in his report all the facts, draws an inference from those facts, there the Court, having all the information before it, may draw its own inference, even though it should differ from that of the Master. But is there any authority to shew that where the Master has founded a conclusion upon particular facts, which conclusion would be right if there were not other

facts in the case, which the Master has not found, an inquiry could be directed as to those facts, at the instance of a party who had not excepted to the report in that particular?" *Per* Lord Plunket, in *Mannix v. Drinan* 116

2. The respondent, in the affidavit made by him to shew cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment was a certain specified sum exceeding the amount of the principal sum mentioned in the bond, and six years' interest thereon; and did not rely on the 3 & 4 W. 4, c. 27, s. 42, as a bar: *Held*, that a report finding that the principal money, with six years' interest thereon only was due on foot of the judgment, was erroneous, it being contrary to the admission in the affidavit. *E. E. Tristram v. Harte.* 386

MISTAKE.

See PLEADING, III., *Answer*, 4, and *Demurrer & Plea*, 1.

MONEY.

See SEQUESTRATION, 1.

MORTGAGE.

See LANDLORD AND TENANT, II, 1, 2.

PLEADING, II., 4.

RECEIVER, II., 9.

I. *Equitable Mortgage.*

A trader executes a mortgage of real estate, with a borrowing clause, and deposits the title deeds with the mortgagee. He subsequently accepts a bill drawn by third parties, and being unable to pay the bill when at maturity, writes to the drawer, to say that it shall be paid out of the produce of the mortgaged premises, and that he will not take his title deeds out of the mortgagee's hands until the bill is paid. The mortgagee communicates to the drawers their assent to the arrangement:—*Held*, that the drawers were entitled to an equitable mortgage. C. *Ex parte Crossfield*, 67

II. *Receiver under Statute.*

1. As cause against a conditional order for the appointment of a receiver under the Mortgage Act (11 & 12 G. 3, c. 10), the respondent impeached the mortgage, and shewed by affidavits of himself and other

persons, very strong grounds to induce the Court to believe it was obtained without good consideration and by fraud. The cause was allowed without costs,—it having been the practice hitherto not to appoint a receiver under the Mortgage Act, except where the right of the mortgagee was uncontroverted; and it appearing by the petition in this case, that from the date of the mortgage to the present time (a period of thirteen years), no payment had been made—or demanded, as the respondent alleged—on foot of the mortgage, although the parties were close neighbours all the time. But the Master of the Rolls declared it should not be understood that petitions under this act may be defeated whenever the respondent comes in on motion and impeaches the mortgage; that for the future the conditional order for a receiver shall be made absolute notwithstanding such impeachment, unless the grounds for such impeachment clearly appear; and that the former practice held out a strong temptation to parties in receipt of the rents to make improper statements upon oath, and ought not to be followed. R. *Cosgrave v. Gannon* 433

2. In reference to Sir W. M'Mahon's observations in *Leahy v. Arthur* (1 Hog. 92) 'that as the mortgage was impeached, it could be enforced only in a Court of Equity by bill; and that such was not a case within the statute, which applied only where the mortgage was uncontroverted.' "I must say, that I have looked very carefully through the act of Parliament, and that I have not been able to discover in it any thing which should limit its application to those cases only in which the mortgage is uncontroverted; and in my judgment the Court should hesitate long before it would adopt such a construction of this or any other statute, as would have the necessary effect of leaving its intention liable to be defeated in every case, and of holding out, whenever a receiver is sought for, an inducement to the persons in possession to come in with rash attempts to impeach the security, whether there be any grounds for impeaching it or not. But whatever may have been the doctrine of the late Master of the Rolls upon this subject, it is plain that it

was totally distinct from the ground of his decision in *Leahy v. Arthur*, which was—that the petitioner has not a legal title and was only a trustee." *Per* Sir M. O'Loughlen, M. R., in *Ibid* 439

3. Upon a petition under the Mortgage Act for a receiver, it appeared that the respondent (who was son of the mortgagor, and claimed to be entitled to an estate for life in the lands under a marriage settlement executed in the year 1796, nearly two years after the date of the mortgage) had been left by the petitioner in the undisputed possession of the lands from the year 1796 until the year 1829—a period of thirty-three years; that, in 1819 Chamley obtained an order in the foreclosure cause, instituted in 1804, for the appointment of a receiver, but without notice to the respondent, who, although in possession, had not up to that time been made a party; that, no proceeding under this order was taken to alter the possession, until February 1829, when an order was obtained to renew the order of February 1819, with neither of which orders was the respondent served; that when the receiver then appointed proceeded to interfere, the respondent immediately gave Chamley notice of the irregularity of his proceedings; and Chamley having promised, but delayed, to sign a consent for the discharge of the receiver, the respondent, on the 9th of February 1832, applied to the Court, and upon the case then made, obtained an order for the removal of the receiver, and thenceforward continued in undisturbed possession of the lands; *Held*, that this was sufficient cause against making the conditional order for the appointment of the receiver absolute. E.E. 1837. *Chamley v. O'Brien*. Cited *per* Sir M. O'Loughlen, M. R., in *Ibid* 441

III. Suits for Foreclosure and Sale.

See, also, PLEADING, II., 4. III.

Answer, 4.

1. Bill to foreclose a mortgage vested in trustees for the separate use of a *feme covert*. The husband, who was made a defendant, is entitled to his costs out of the fund. E. E. *Dillon v. M'Carthy* 192
2. In a decree for foreclosure and sale, where a minor defendant is entitled to

MORTGAGE.

the equity of redemption—ought the decree give the minor a day to shew cause against it? *E. E. Jones v. Ham* 65. See note 66, and *Flood v. Hutton* 340

MARRIAGE SETTLEMENT.

See DEEDS, I., 1, 2.

EXECUTORS AND ADMINISTRATORS, 4, 5.

NEXT OF KIN.

See LUNACY.

NOTICE.

See PETITION.

RENEWAL, 2.

TITHES, 1.

NOTICE OF MOTION.

See TENANTS UNDER THE COURT, 1, 2.

ORDER.

See RECEIVER, II., 12.

RULES AND ORDERS.

Where the time for shewing cause against a conditional order expires on the last of the eight days after Term, the Court will not make it absolute upon a certificate of no cause, until the first day of the next ensuing Term. *E. E. Alexander v. Abernethy* 384

PARLIAMENTARY APPEARANCE.

See APPEARANCE.

PARTIES.

See PLEADING, II.

PENAL RENTS.

See LANDLORD AND TENANT, I., 2.

PENDENCY OF SUIT.

See CREDITORS' SUITS.

PLEADING, I.—*Bill*, 7—II., 1, & III., 2.

PERJURY.

See PLEADING, III.—*Answer*, 1.

PETITION.

See INFANT, 1, 2, 5, 6.

PRACTICE, 4.

A clear Term must elapse after notice of

PLEADING.

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the answering affidavit, before the respondent (a solicitor) can be entitled to have a petition presented against him dismissed with costs, for want of prosecution. *R. Bucke v. Murphy* 378

PLAINTIFF.

See PLEADING, III.—*Bill*, 1, 2.

PLEADING.

See EVIDENCE, II., 2.

I. *Form and validity of.*

I. *Bill.*

1. "Where the plaintiff filed a bill to impeach a lease made by his ancestor, as contrary to the power of leasing which the latter had, and the defendant, in his answer, relied upon the covenant in the lease as entitling him to compensation out of the assets of the lessor, such an equity cannot be made available in this suit; but the defendant should have filed a cross-bill." *Per Lord Plunket, in Steele v. Mitchell* 10
2. *Semble*, that where a bill is filed by two stockholders entitled to separate sums of stock, on behalf of themselves and all other holders of the same stock, praying relief; if it should appear that one of the plaintiffs is not entitled to relief by reason of some equitable circumstances peculiar to himself, the Court may nevertheless, in that suit, give the relief sought, and is not bound to dismiss the bill. *E. E. Corballis v. The Undertakers of the Grand Canal* 29
3. A sequestrator appointed over a parish, at the suit of certain judgment creditors of the Incumbent, presented a memorial under the 1 & 2 Vict. c. 109, for arrears of tithe composition *due before the sequestration issued*, and a certain sum was accordingly lodged in the Treasury on account of those arrears; but before payment, the Incumbent died, and, the memorial having stated, by mistake, as it was alleged, that he was the person entitled to the arrears, his personal representative claimed the money in the Treasury against the sequestrator, and the Officer consequently refused to pay either party without the order of this Court. Whereupon, a bill was filed in the names of the sequestrator and the judgment creditors, in whose behalf he was appointed, as co-plaintiffs, against

the personal representative of the Incumbent, stating the foregoing facts, and praying that the sequestrator might be decreed to be the person entitled to receive the money in the Treasury:—*Held*, that a general demurrer should be allowed to the bill upon two grounds:—first, that the sequestration was not retrospective, but attached the future accruing tithe only; and, therefore, did not entitle the plaintiffs to the money in the Treasury; secondly, that, at any rate, the sequestrator could have had no interest or title in this suit, and should not have been made a co-plaintiff. *R. Egan v. Heenan* 50

4. *Semble*, that where a suit abates by the death of the personal representative, the administrator *de bonis non* of the deceased may be brought before the Court by bill of revivor, and a supplemental bill is not necessary. *E. E. M'Tiernan v. Bell* 193

5. Wherever an old interest is transmitted, or a new interest vested in a new party, after the institution of the suit, strictly speaking that is supplemental matter, although it occurs before issue joined; but any other circumstance which occurs before issue joined, if it be not the vesting of a new interest or the transmission of an old interest, is the subject-matter of an amendment. A tenant in tail, who comes into *esse* after the institution of the suit, ought properly to be brought before the Court by supplemental bill; although in Chancery he has been made a party by amendment, where he came into *esse* before issue joined. *E. E. Carnegie v. Johnson* 197

6. In a redemption suit, the bill charged that the *habere* was executed "on or about the 18th of November, and possession was on that day taken." The answer stated "that it is not true, as in bill untruly stated, that said *habere* was executed on the 18th of November; for that defendant believed it was executed on the 17th of November:—" *Held*, that the precise day of the execution of the *habere* was sufficiently put in issue. *E. E. Fitzgerald v. Hussey* 319

7. Before issue joined, an infant tenant in tail, born *pendente lite*, may be made a party by amendment. *E. E. Greer v. Mercer* 385

8. The Commissioners of Charitable Donations filed a bill against A. and B. seeking for a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix, and all her personal estates and effects, &c. The bill set out the will, from which it appeared that the testatrix devised all her freehold and leasehold estates to A. for life, remainder to B. for life; remainder (except as to a certain rent) to the Commissioners of Charitable Donations, &c., upon trust to renew leases and apply rents, &c., and appointed A. and B. executors of her will; and the bill then prayed that an account might be taken of her freehold and leasehold estates, &c., and that the title-deeds relating thereto might be brought into Court. The bill did not state that the personal assets of the testatrix were insufficient for the payment of her debts, but it averred that the defendants had paid a special bequest in her will mentioned. Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real) allowed. *R. Commissioners of Charitable Donations v. Espinasse* 324

9. Where a party made defendant as assignee of an insolvent debtor, dies pending the cause, a supplemental bill is necessary to bring the new assignee, appointed in place of the deceased, before the Court. The 41st section of the late Insolvent Act (3 & 4 Vic.) applies only to the cases of plaintiffs, and not to defendants. *R. Meagher v. O'Mara* 471

II. Answer.

See, also, EVIDENCE, II., 1, 3.

PLEADING.—I., Bill, 6.

1. "Where the plaintiff filed a bill to impeach a lease made by his ancestor, as contrary to the power of leasing which the latter had, and the defendant, in his answer, relied upon the covenant in the lease as entitling him to compensation out of the assets of the lessor, such an equity cannot be made available in this suit; but the defendant should have filed a cross-bill." *Per Lord Plunket, in Steele v. Mitchell* 10
2. The defendant by his answer submitted, that by reason of the 3 & 4 W. 4, c. 27,

s. 40, the plaintiff was barred from maintaining his suit against him, *as the heir-at-law* of the conusor, and that it was a good defence both as to the real and personal estate of the conusor, and he relied upon that statute as if he had pleaded the same:—*Held*, that it was competent for him, *as personal representative* of the conusor, to rely on the defence given him by that statute. *E. E. O'Hara v. Creagh* 179

II. Parties.

See, also, PLEADING, I.—*Bill*, 9.

1. Wherever an old interest is transmitted to, or a new interest vested in a new party, after the institution of the suit, strictly speaking, that is supplemental matter, although it occurs before issue joined. In some cases, however, the new party has been brought before the Court by amendment. *E. E. Carnegie v. Johnson* 197
2. *Held*, upon demurrer, that the Banker's Act, 33 G. 2, c. 14, is not repealed by the 6 G. 4, c. 42, and that upon the stoppage of payment by a Joint Stock Banking Company formed under the latter statute, a trust is created—in favour of the creditors, and affecting all the property of the shareholders—under the Banker's Act, which may be administered by this Court, at the suit of any creditor against the Public Officer of the Company, instituted without making the other creditors of the shareholders parties;—it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities of the Company, and it not appearing that the shareholders have any other liabilities than those of their co-partnership. *R. Fawcett v. Hodges* 232
3. Before issue joined, an infant tenant in tail, born *pendente lite*, may be made a party by amendment. *E. E. Greer v. Mercer* 385
4. The devisee of the equity of redemption in trust for other persons, is a necessary party to a foreclosure suit. *E. E. Scully v. Scully* 494

III.—*Practice as to Pleadings.*

I. *Bill.*

See Costs, V., 1, 2.

1. After the defendants had answered in a suit by husband and wife, relating to the

wife's separate estate, leave given to amend the bill by striking out the name of the husband as a co-plaintiff, he having lately become insolvent, and by substituting in his stead the name of a party to sue as the wife's next friend, and also by inserting the names of the husband and his assignee as parties defendant, upon the terms of the proposed next friend giving security by recognizance, with sufficient sureties, for the costs already incurred; the Court declining to require such security for future costs. *R. Ring v. Nettles* 53

2. Where the cause abates by the death of a sole plaintiff, and it becomes necessary to file a bill of revivor and supplement, it may be done without the order of the Court first obtained. *E. E. Brown v. Allen* 503
3. "But where the cause abates by the death of one of several defendants, and it becomes necessary to file a bill of revivor and supplement, the leave of the Court must be first obtained." *Per Pennefather, B. Ibid*
4. After answer and before issue joined, the plaintiff assigned all his right and interest in the subject-matter of the suit, but refused to allow the assignee to proceed in his name. On motion of the assignee for leave to amend the bill, by striking out the name of the plaintiff and inserting his own instead; *Held*, that such amendment could not be allowed. *R. Magrath v. Heron* 476
5. "All those cases, I think, shew, that notwithstanding the dismissal of the bill, the Court may, in a case like the present, make an order on the plaintiff touching his recognizance; and the remaining question is, whether I ought to make such an order upon him as that which has been applied for." *Per Sir M. O'Loughlen, M. R., in O'Leary v. Purcell* 332

II. *Answer.*

1. The answer was sworn in December 1838; publication passed in May 1840. In Hilary Term 1841, the plaintiff applied to take the answer off the file, in order to prosecute the defendant for perjury in it: *Held*, that the application was not too late. *E. E. Reeves v. Clarke* 190

2. In an injunction cause, upon the coming in of the defendant's answer, the plaintiff gave notice of motion to continue the injunction upon equity confessed, but did not state that such motion should be without prejudice to the right of excepting to the answer for insufficiency: *Held*, that exceptions afterwards filed were irregular: the notice of motion to continue the injunction should have been "without prejudice," &c. R. *Crofts v. Lord Egmont* 227
3. A motion to continue an injunction upon equity confessed by the answer, without any saving of the right to except, is a waiver of all objections to the answer for insufficiency *Ibid* 229
4. In a foreclosure suit, a party who was made a defendant as one of the co-heiresses of the mortgagor, filed a disclaimer by mistake, and in ignorance of her rights; and after a decree to account had been obtained, moved for liberty to withdraw the disclaimer and file a supplemental answer, stating her lately discovered title to the surplus after payment of the plaintiff's demand. The motion was refused, upon the ground that it would be impossible to put the plaintiff in the same situation as he would have been in, if the defence had been stated on the record in due time; but without prejudice to such further application as the defendant might make for the purpose of establishing her claim to a share of the surplus, if any, after satisfying the demands under the decree. R. *Glenny v. Murdock* 443

III. Demurrer and Plea.

1. Where it appeared that by accident, a demurrer, which extended to the whole bill, was not set down for argument within fourteen days after notice, pursuant to the 19th General Order of November 1834, the Court allowed it to be set down. R. *Jeffryes v. Goodwin* 99
2. The 19th General Order of November 1834, as to a plea and demurrer, does not apply to a plea of the pendency of another suit for the same subject-matter, where the only question upon the plea is as to its truth, such plea should not be set down for argument, but the plaintiff should serve notice of motion for a refer-

rence to the Master as to the question of fact—whether the two suits are for the same matter. R. *Howlett v. Lambert* 473

POLICY OF INSURANCE.

See FRAUD.

POWERS.

See ESTATE, 1, 3.

- A. being seized of an undivided moiety of lands held under a lease for lives renewable for ever, in 1775, settles the same, At the use of himself for life, remainders to his first and other sons, reserving to himself a power of leasing. He afterwards purchases the other moiety, and makes a lease of the entire, not warranted by his power, and covenants therein for quiet enjoyment, &c. On the marriage of his eldest son, he conveys the entire to trustees to the use of himself for life, remainders to his son for life, remainders to the sons of his son as the son should appoint; *Held*, that the son of A.'s son could not impeach the lease as to the undivided moiety in the settlement of 1775, as being contrary to the leasing power. C. *Steele v. Mitchell* 1

PRACTICE.

See, also, the respective Titles.

As to Evidence.

See EVIDENCE, IV.

As to Pleading.

See PLEADING, III.

Liberty to proceed.

See LANDLORD AND TENANT, I, 1.

1. The plaintiff entered the rule to confirm the report, and the order that the cause be set down to be heard on report unexcepted to and merits, on the same day. The defendant afterwards excepted to the report; *Held*, that the cause was irregularly set down, that it should therefore be struck out of the list, and that the plaintiff should pay the costs of the day. E. E. *Scully v. Scully* 384
2. When a plaintiff claims to be entitled to a property under an alleged trust in a will created for those filling a certain character, which he alleges that he sustains, it is in the discretion of the Court whether it will first decide the question

whether there is any such trust, or put the petitioner to establish the character in which he sues in the first instance.—

Dom. Proc. Malone v. Malone 536

3. In ordinary cases, the proper course is to ascertain the question of fact in the first instance *Ibid*
4. In order to have a cause set down to be heard for further directions in the Court of Exchequer, a petition must be presented for the purpose. *E. E. Cleary v. Cleary* 562
5. Practice as to issuing a *fi. fa.* upon a decree, against the goods of the defendant, pursuant to the 3 & 4 Vic. c. 105, ss. 27, 29. *E. E. Ould v. Griffin* 565

POWER OF ATTORNEY.

See STOCK, 1.

PRINCIPAL AND SURETY.

See RECOGNIZANCE.

PRIORITY OF SECURITIES.

See COSTS, I, 3, 6.

EXECUTORS AND ADMINISTRATORS, 3, 4, 5, 6, 7.

1. An annuitant by deed unregistered (plaintiff in fifth cause), filed a bill for arrears, making subsequent encumbrancers by deeds of annuity and mortgage, duly registered (plaintiff in second and third causes), and a creditor by judgment intermediate between the unregistered and registered deeds (plaintiff in first cause), parties defendant. The subsequent annuitant and mortgagee answered, insisting on their priority to the plaintiff, by reason of the registration of their deeds; and the decree to account declared that their priority *was admitted by the plaintiff*. The judgment creditor, to whom a large sum was due, did not seek relief in this cause, and allowed the bill to be taken *pro confesso* against him. Before any demands were proved or report made, the plaintiff obtained assignments of the registered annuity and mortgage; and the Master reported that he did not find any thing due upon them, the same having been assigned after decree to the plaintiff, who declined to prove any demand under them, being willing that they should remain charged upon the unsold lands. There was ac-

cordingly a final decree for the sum due on the unregistered annuity, without regard to the registered encumbrances. Another creditor (plaintiff in fourth cause) by judgment, also intervening between the unregistered and registered deeds, who was not a party in the above suit, filed his bill, and in his cause had a report of the sum due to him. The fund in Court was realised in this latter cause, but was afterwards transferred to the credit of all the causes, and its amount was considerably less than the sum due upon the unregistered annuity. The judgment creditors now insisted that their judgments were entitled in priority to the unregistered prior deed, by reason of the conflict and *admitted* priority of the registered deeds subsequent to the judgments: *Held*, that the judgment creditor who was party to the fifth cause, but allowed the bill to be taken *pro confesso* against him, and did not prove his demand in that cause, was bound by the final decree, and could not be heard to insist on his priority. *Held, also*, that by conflict of unregistered and registered deeds, judgments intermediate do not obtain absolute priority to the unregistered deed, until it is absolutely postponed to the registered deed. *R. Murtagh v. Tisdall* 85

2. *Seemle*, where the decree to account declared that the plaintiff, who was entitled under an unregistered deed of the 10th July 1808, admitted the priority of A. and B., who were entitled under registered deeds of the year 1827, and then directed an account of encumbrances prior to the deed of the 10th July 1808, judgment debts prior to the registered deeds of 1827, might be proved under the decree: and, *Seemle*, A. and B. having assigned to the plaintiff after the decree to account, and no demand being proved nor any thing found due upon the registered deeds, the unregistered deed *recovered* its original priority to the intermediate judgments, at least as to all creditors not parties *Ibid*
3. "I think it must now be taken as settled upon authority, that a prior deed, although unregistered, shall prevail against a judgment, where the question is simply between the judgment and the unregis-

tered deed. But where there is subsequent to a judgment a registered deed which is preferred to the unregistered, the judgment obtains priority in virtue of the preference of the registered deed. Such is the construction which has been given to the Registry Act, and such is, in my opinion, its proper construction." *Per* Sir M. O'Loughlen, M. R., in *Ibid* 96

RECEIVER.

See BANKRUPT & BANKRUPTCY, 1.

SERVICE, 3.

Under the Mortgage Act.

See MORTGAGE, II.

I. Generally.

1. The Court, upon a motion on behalf of a landlord, for liberty to proceed at law, notwithstanding the appointment of a receiver, will not enter into any question of equities between the landlord and tenant, but will, in a proper case, refer it to the Master, to inquire and report whether any proceedings should be taken in defending the ejectment, or in relation thereto. R. *Cramer v. Griffith* 230
2. "It is the duty of a receiver to render the estate over which he is appointed as productive as he can; and it is the duty of the Court, whose officer he is, to take care that he does so. That although in the present case the receiver might not be chargeable with any positive misfeasance or intentional omission of material matters in the preparation of the rental, yet this case shewed what very serious mischief might follow if a receiver in the cause were permitted to be a purchaser under the decree, if he could have an interest in depreciating that estate, the value of which it was his duty to enhance. Such an interest might extend far beyond the preparation of the rental; it might be the operative principle during the whole term of the receivership: therefore, in no case would the Court sanction a sale to the receiver, unless it clearly appears that it would be for the benefit of the parties in the cause to hold him to his purchase." *Per* Sir M. O'Loughlen, M. R., in *Alven v. Bond* 372
3. The practice not to appoint receivers under the Mortgage Act, except where

the right of the mortgagee was uncontroverted, will not be continued; but for the future, the conditional order for such will be made absolute, notwithstanding the mortgage may be impeached, unless the grounds for such impeachment clearly appear. R. *Cosgrave v. Gannon* 433

4. "Upon a bill filed to raise the arrear of an annuity, it is quite settled that the defendant cannot resist the appointment of a receiver by coming in on the receiver-motion and impeaching the security."—*Per* Sir M. O'Loughlen, M. R. in *Ibid* 437
5. The Court of Chancery refused to appoint a receiver under the Mortgage Act, where it appeared that the petitioner had a foreclosure suit pending in the Court of Exchequer. C. 1835. *Chamley v. O'Brien* 440, note
6. Upon a creditor's bill, founded on the equity of 33 G. 2 (Banker's Act), against the Public Officer of a Joint Stock Banking Company, consisting of a very large number of persons incorporated and registered pursuant to the provisions of 6 G. 4, c. 42, the bank having stopped payment, an injunction to restrain the Directors, &c., from interfering, and a receiver to collect the joint property, &c., appointed before answer, the defendant having made an affidavit for the purpose of resisting the motion, and going into the merits of the case. Form of the order: authority and duties of the receiver—his recognizance and sureties, and remuneration. R. *Acheson v. Hodges* 516
See, also, 523

II.—Upon Judgments.

1. The matter of a petition under the 5, 6 W. 4, c. 55, having abated by the death of the respondent, the Court will not, on the petition of another judgment creditor, order the proceeding in the first matter to be revived, and the receiver appointed therein to be extended to the second matter; but will order that the receiver already appointed, be appointed in the matter of the second petition. E. E. *O'Brien v. Kenny* 55
2. The conditional order for the appointment of a receiver on a judgment, under the 5 & 6 W. 4, c. 55, is the order ap-

pointing the receiver within the meaning of that act, it being subsequently made absolute. *E.E. Barry v. Wilkinson* 121

3. The order appointing or extending a receiver on a judgment attaches the arrears of rent then in the tenant's hands, for the benefit of the person obtaining it. *Quære?* *Ibid*

See observations upon this case in *Ibid* 564

4. Tenant for life confesses a judgment,—is afterwards discharged as an insolvent—and then dies. The Court has jurisdiction, under the 5 & 6 *W. 4*, c. 55, after his death to make absolute, as against his assignees, a conditional order for extending a receiver, obtained in the lifetime of the insolvent, upon a petition against him, so far as to give effect to the lien of the petitioner on the life estate, and the rents received by the receiver thereout, and the purposes necessarily connected therewith *Ibid*

5. Before the passing of the 5 & 6 *W. 4*, c. 55, a judgment creditor proceeded by *elegit* and inquisition, but was kept out of the possession of the estate by prior creditors. He afterwards obtained an order extending a receiver obtained on the petition of a prior creditor to the matter of his petition on his judgment: *Held*, that he was entitled to the costs of his proceedings at law in the same priority with his demand *Ibid*

6. Upon an application to let lands in the possession of A., in the matter of a petitioner under a judgment against the conusor, it appeared that A. was the alienee of the conusor by deed subsequent to the rendition of the judgment, the Court refused to make the order, holding that the petition and orders thereon were wrong; for that the petition should have been presented against the person over whose estate the receiver was sought to be appointed. *E.E. Dunn v. Massey*, 129 in note

7. A creditor by judgment, entered pursuant to a warrant of attorney, obtained an order for a receiver under the 5 & 6 *W. 4*, c. 55, more than two calendar months before the issuing of a commission of bankrupt against the respondent, the conusor; *Held*, that his execution was protected by the 95th section, from the operation of the 126th section of

the 6 *W. 4*, c. 14. *E.E. Read v. Davis* 153

8. Where a receiver on a judgment is appointed over a portion of lands held under one lease, the residue remaining in the possession of the respondent, the latter must either pay his proportion of the head-rent, or submit to a receiver over the whole of the lands, if otherwise, the lands over which the receiver has been appointed would be insufficient to pay the petitioner within a reasonable time. *E.E. Henegan v. Little* 189
9. A receiver will not be appointed under 5 & 6 *W. 4*, c. 55, on the petition of a judgment creditor, over lands which such creditor could not have extended upon an *elegit*, as where the judgment attached only upon an equity of redemption, unless the equitable title to relief is clear. Therefore, a receiver was refused over the possession of a purchaser of the equity of redemption for valuable consideration, where it appeared that the judgment in question, having been entered as against J. D., his full name being J. K. D., was not discovered by negative searches made on behalf of the purchaser for judgments against J. K. D., and there being contradictory affidavits as to the fact of the purchase having been made with notice of the judgment, it also appearing that the legal estate outstanding in a prior mortgagee, had been assigned to a trustee for the purchaser of the equity of redemption, and there being nothing before the Court to shew that the petitioner's judgment was at any time re-docketed. *R. Chapman v. Dunbar* 202
10. A judgment creditor is entitled to a receiver under the 5 & 6 *W. 4*, c. 55, in every case in which he could at law issue an *elegit*; therefore, in such case, although the parties in possession may come in and shew, as cause against the appointment of a receiver, such an equitable defence as upon a bill filed for that purpose would probably entitle them to a decree, the Court will appoint the receiver on the judgment creditor's petition, but retain the fund until the party relying upon the equity has had the opportunity of having it regularly established by a decree. *R. Walsh v. Keane* 426

11. "I am of opinion that where the petitioner has a clear legal title, matter of equitable defence ought not to be admitted as cause against the appointment of a receiver under this act, even though the Court may have little doubt of its sufficiency when rendered operative by a regular proceeding." *Per* Sir M. O'Loughlen, M. R., in *Ibid* 432
12. An absolute order for the appointment of a receiver on a judgment under the 5 & 6 W. 4, c. 55, which has not been acted on for more than a year, will not be renewed, unless it appear that the judgment has been revived within the year previous to the application. E. E. *Carr v. Austin* 492
13. Where a receiver has been appointed under the 5 & 6 W. 4, c. 55, and not extended to any other matter, the Court will not, at the instance of the petitioner, make an order on him merely to pay the petitioner the costs of his appointment, unless the latter take the order at his own expense. E. E. *Anonymous* 504
14. "It is the daily practice of the Court to appoint receivers over real estate, and to order the tenants to pay their rents to the receiver, although those rents are, in fact, debts founded upon contract; and there may be a dispute as to the person entitled to them." *Per* Sir M. O'Loughlen, M. R., in *Acheson v. Hodges* 522
15. A receiver appointed over lands on a judgment creditor's petition, under the 5 & 6 W. 4, c. 55, collects the arrears as well as the accruing rents; but the petitioner's right is analogous to that of an *elegit* creditor proceeding at law, and attaches only the rents accruing after the appointment of the receiver; the arrears being collected for the debtor, in order to prevent the inconvenience of two receivers over the same premises. R. *Marquis of Sligo v. O'Malley* 527
16. In this Court, the order extending a receiver from the matter of one petition to that of another, is absolute in the first instance, but it attaches only the after-accruing rents, and not those which had accrued due before, although *received* after such order was pronounced *Ibid*
17. The Court of Exchequer has not de-

- dided in *Barry v. Wilkinson*, *ante*, 121, that the order appointing a receiver on a judgment, attaches the arrears in the tenants' hands for the benefit of the person obtaining it. E. E. *Barry v. Wilkinson* 564
18. "When a receiver is appointed (under 5 & 6 W. 4), we thought that convenience required, and the language of the statute authorised, that he should be the person to receive the arrears due at the time of his appointment; for otherwise, the tenants might be exposed to double distress; but saying that, we did not mean to decide that he should not receive them for the benefit of the respondent, nor did we decide it." *Per* Pennefather, B. *Ibid*

RECOGNIZANCE.

Bill for specific performance of an agreement to grant a lease, and for an injunction to restrain execution of an *habere*. On the coming in of the answer, the injunction was continued to the hearing, on the terms, amongst others, of the plaintiff giving security by recognizance "in the sum of £827, being the sum stated in the defendant's answer to be due for rent up to and including the 1st of May last." A recognizance reciting the order, and purporting to be in pursuance of it, was entered into, but by mistake it was conditioned,—“If the said J. O'L. (the plaintiff) shall well and truly account (&c.) for *mesne rates*, and well and truly pay (&c.) such *sum as shall be decreed for the said mesne rates*,” then the recognizance to be void. Afterwards the bill was dismissed with costs, and the plaintiff having become insolvent, the Court (for the purpose of enabling the defendants to proceed against the sureties for the sum of £827 upon the recognizance) ordered that the plaintiff should within one month pay the said sum of £827 in the injunction order and recognizance mentioned, *as and for the mesne rates of the lands in the pleadings mentioned*, and in default of such payment, that the defendants should be at liberty to sue on the recognizance without further order. R. *O'Leary v. Purcell* 329

RECTOR.

RECTOR.

See INJUNCTION, 4.
WASTE.

REDEMPTION.

See LANDLORD AND TENANT, II.

RELEASE.

See EVIDENCE, III.

REMEMBRANCER.

See MASTER AND REMEMBRANCER.

RENEWAL.

1. By a lease executed in 1747, a Member of the Incorporated Society demised to the Society a piece of ground, at a rent of 5s. and covenanted to renew the lease for ever. The lease contained a covenant, on the part of the Society, to build and maintain upon the demised premises a house fit for the "reception and education of twenty boys and twenty girls, to be nominated by the Society, according to the true intent and meaning of their charter;" and a proviso for re-entry, in case the Society should not continue to educate twenty boys and twenty girls, "according to the true intent and meaning" of the said indenture. Up to the year 1819, the Society kept up a female Protestant boarding-school on the premises; but after that they gave it up, and kept a day-school, to which Roman Catholics were admitted. In 1830, they demised the school-room and land to a person, who erected a new house, fit for a day-school merely, and used the rest of the premises for farming purposes; *Held*, that as the charter of the Society gave them power to make bye-laws, those acts were not breaches of the covenant, and formed no ground for refusing a specific performance of the covenant for renewal, although the charter was expressed to be granted for the instruction "of the children of the Popish natives in the principles of the Protestant religion," the Court considering that the mode of instruction was left to the discretion of the members of the Society. C. *The Incorporated Society v. Ross* 257
2. The assignee of a lease for lives renewable for ever, upon the payment of a

RENEWAL.

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fine for every life added, confessed judgments, was discharged as an insolvent, and died. One of the lives in the lease being dead for some years, the landlord served notice upon the heir of the original lessee, a judgment creditor of the insolvent in possession under an *elegit*, and the assignee of the insolvent, who had not been in possession of any part of the premises, calling on them to renew. No renewal was taken out, and no tender made of the fine. In seven years afterwards, another judgment creditor of the insolvent, who had obtained a decree for a sale of the lands for payment of his judgment, with the sanction of the Court, in that suit, files a bill for a renewal:—*Held*, that he was entitled to institute such a suit. *Held, also*, that service of the notice was not sufficient to create a forfeiture of the right to a renewal. An assignee of an insolvent who is not in possession of the premises, is not an "assignee" within the meaning of the first section of the Tenancy Act, from whom to demand a renewal fine. C.—*Smith v. Shannon* 452

3. The landlord having, in the course of a negotiation for a renewal, required production of the assignment by the original lessee, which was missing:—*Held*, that that alone would have prevented the forfeiture *Ibid*
4. In such a suit, a judgment creditor of the party entitled to the lease is a competent witness for the plaintiff *Ibid*
5. "Suppose an actual assignment had been made of those very lands for particular purposes, reserving the right of the assignor to the lands, when those particular purposes had been satisfied, would the service of a notice (the notice from the landlord to the tenant, required by the Tenancy Act) on such an assignee deprive the assignor of his right to insist on the benefit of the covenant for renewal? If it would not, then, how can an assignment which, although general in its terms, is made for a particular purpose, namely, the payment of debts, and which leaves in the party assigning a right to any surplus that may remain after that purpose is satisfied, have a greater effect than an assignment of those very lands, which was expressly declared to be for a particular

purpose, would have had? It appears to me that it might as well be said that the assignee of an insolvent could make a good tenant to the *præcipe*." Per Lord Plunket, C., in *Ibid.* 467

6. "In my opinion, the word 'tenant' in the act (the Tenantry Act, 19, 20 G. 3, c. 30) means 'tenant in possession; and the word 'assignee' in the act means the same thing as if the Legislature had said 'assignee in possession;' and in construing an act passed for the relief of tenants, I am bound to protect the parties for whose relief the act was passed." Per Lord Plunket, in *Ibid.*

REPORT.

See MASTER & REMEMBRANCER.

REVIVOR.

See PLEADING, I.—*Bill*, 4, and III. *Bill*, 2, 3.

REVIVOR FOR COSTS.

See COSTS, III.

RULES AND ORDERS.

- 10th General Order.—Costs—Master 105
19th ————Plea or Demurrer 99, 472
20th ————Plea or Demurrer 99
204th ————Interest 469

SALES, JUDICIAL.

See ATTACHMENT, 2.

I. Generally.

1. The plaintiff's attorney will be permitted to make copies of deeds lodged in the office, for the purpose of making out title, and will not be obliged to take out office copies thereof. *E. E. Bradshaw v. Shortt* 198
2. *Seemle*, that an order of the Court is necessary for the purpose *Ibid*
3. When in consequence of a defect in title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase-money, interest, and taxed costs, without deduction; therefore, where the interest and costs are to be paid out of a fund consisting of rents of the lands, the discharged purchaser is entitled to an order including the amount of the Usher's poundage payable in respect of the sum which he is entitled to receive out of the fund. *R. Johnson v. Reardon* 200

SALES JUDICIAL.

4. Where lands, let under the Court for seven years pending the cause, are sold under the decree, and the tenancy is determined before the expiration of the term, the purchaser having notice of the tenancy at the time of the sale, and going into possession, is not entitled to the crops sown by the late tenant and growing on the lands; the late tenant is entitled to emblements, and he is not affected by the custom of country as to the outgoing tenant's right after the expiration of his lease. *R. Creed v. Creed* 207
5. *Seemle*.—In such a case, the purchaser insists upon retaining the crops, the Court will direct a reference at his expense as to the value of the crop and the damage sustained by the late tenant in relation thereto *Ibid*
6. Where lands are sold under a decree, the purchaser is entitled to have all judgments paid out of the purchase-money satisfied upon record. *R. Fitzgerald v. Lane* 339
7. But where a judgment creditor went in and filed a charge under the decree, to which the plaintiff filed a discharge, relying on the Statute of Limitations, and nothing further having been done upon the charge, the Master's report did not find any thing due on foot of the judgment: *Held*, that notwithstanding the death of the judgment creditor, the purchaser under the decree was not entitled to have, such judgment satisfied nor the lands released from it by deed, as the filing of the charge made the creditor a *quasi* party, and bound him and his representatives by the decree *Ibid*
8. And when a judgment creditor comes in under a consent order after the final decree, and the Master finds against the judgment as being barred by the Statute of Limitations, the Master's report must be made up and confirmed, otherwise the purchaser under the decree will be entitled to have the judgment satisfied, or a release executed *Ibid*
9. Sale under decree set aside after confirmation, on the ground that the purchase was made in trust as to one-third for the receiver in the cause, and as to another one-third for the father of the said receiver; and the purchaser was disallowed interest on the purchase-money lodged

- by him, and all costs incurred by him in investigating the title, and in relation to the sale, &c. R. *Allen v. Bond* 365
10. A purchaser cannot be attached for not completing his purchase until after a report of good title has been obtained. R. *Vincent v. Going* 480
11. The purchaser of a *life estate* under a decree, having lodged one-fourth of the purchase-money, served the rule *nisi* to confirm the sale on the 22nd of January. The eight days limited by the rule expired on the 3rd of February, and no cause was shewn. The tenant for life died on the 12th of February, and before the sale had been absolutely confirmed, or the remainder of the purchase-money had been paid in. The purchaser then refused to proceed, the estate having determined:—*Held*, that as the sale *might have been* confirmed, the purchaser, although not guilty of any unreasonable delay, was bound and liable to the risks and losses of the estate, provided a good title could have been made: the Court, therefore, refused his application for the one-fourth of the purchase-money lodged by him; and ordered, on the plaintiff's motion, that it should be referred to the Master to inquire, &c., whether a good title could have been made at the time of the sale, or at any and what time previous to the death of the tenant for life *Ibid*
This order was reversed by Lord Plunket, on appeal Ibid, 489, note
12. Where the purchaser has been discharged upon a report of bad title, it is the right of the inheritor to have the estate again set up to be sold; and, therefore, the Court will not, against his desire, substitute in the place of the discharged purchaser a person who offers to take the estate at the same price and not object to the title. E. E. *O'Connor v. Bernard* 496
13. A purchaser under the decree of the Court was discharged upon a report of bad title, and it was ordered that his deposit be paid back to him, without prejudice to his applying for the interest thereon and his costs when there should be a fund in Court. He died before either the costs were taxed or a fund for their payment was realised:—*Held*, that on a fund being afterwards realised, his personal representative was entitled to be paid thereout the interest and costs.—E. E. *Mackay v. Orr* 499
14. An order had been made awarding an attachment against the purchaser for not completing his purchase. Thereupon he obtained an order of reference as to the title:—*Held*, that he was not entitled to interest for the period intervening between the date of the lodgment of the deposit and the date of the order of reference, or to the costs incurred by him during that interval; and that the costs of the order for the attachment should be set off against the interest and costs due to him. *Ibid*
- II. *Opening Biddings.*
15. In opening biddings, this Court does not tie itself down to any precise rule as to the amount of the sum to be advanced, but looks substantially to that which is for the benefit of the parties, and to the circumstances of the particular case before it. E. E. *Power v. Power* 511
16. The biddings having been opened upon an advance of £150 on £2500, the Court refused the application of the first purchaser to open the second biddings upon an advance of £150, it appearing that he had been present at and had bid at the second sale. E. E. *Jackson v. Lord Granard* 513

SEQUESTRATION.

See PLEADING, I.—*Bill*, 3.

1. The decree declared that the estate therein mentioned was divisible into three parts, and that the younger children of A., B. and O. were severally entitled to a third. O. was largely indebted to the estate, and a sequestration issued and continued against him until his death; by means of which certain sums were brought in from time to time and allocated according to the rights of the parties. Two of O.'s younger children died before any of the funds were allocated, and the Master's report found that certain sums (being their shares of the fund then in bank) were payable to their personal representatives. O. became entitled as executor and sole legatee of one of his deceased children, and as administrator and sole next of kin of the

other, to both their shares, but made no claim, there being a sequestration against him. He died owing a large balance to the fund, and the proportion of that balance to which his own younger children should have been entitled, exceeded the amount of the aforesaid shares. T., another of O.'s younger children, having become legal personal representative of his deceased father and brothers, now applied for the aforesaid shares, after payment of the costs due to their solicitor; *Held*, that when O. became entitled to this money, it was attached for the purposes of the decree by the sequestration against him, and should not now be paid out to his representative.—

R. *Crone v. O'Dell* 12

2. There were ten younger children of O., all of whom appeared and proceeded jointly by the same solicitor, and incurred costs to a considerable amount. The surviving children were allowed by the solicitor to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable, and he now applied for payment out of the sum in bank (*i. e.*, the shares of the two deceased children) of the entire amount of the costs:—*Held*, that the shares of the two deceased children were liable in the first instance for that proportion only of the costs which they should have paid if the others had contributed equally; and that it was the duty of the solicitor to have taken care that the costs should be borne equally by the several younger children *Ibid*

3. "The case of *Waite v. Bishop* (1 Cr. M. & Ros. 507), decides expressly that a sequestration is not retrospective, and attaches the future accruing profits only." *Per* Sir M. O'Loughlen, M. R., in *Egan v. Heenan* 53

4. If the defendant have not appeared in the cause, it is not necessary to give him notice of a motion for liberty to execute a sequestration on the decree against the real estate of the defendant; but the motion will not be granted if the annual value of the real estate be not stated in the affidavit. E. E. *Edwards v. Plunkett* 502

5. "It is a common exercise of the undoubted jurisdiction of this Court to appoint

sequestrators and receivers of personal estate, although such personal estate may consist of debts founded upon contract: and there may be a dispute as to the person entitled to them." *Per* Sir M. O'Loughlen, M. R., in *Acheson v. Hodges* 522

SERVICE.

1. The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute the service of a subpoena to appear and answer, upon the agent of a party made a defendant in respect of a charge he has on the lands, the subject of the suit; the manifest intention of the act being, to authorise this service to be substituted upon the agent or receiver of the owner of the estate. E. E. *Maclean v. The Marquis of Donegal* 383
2. On a bill against the Directors of an English Insurance Company for payment of the amount of a policy of insurance, service of the subpoena to appear and answer substituted on the Irish agent of the Directors, it appearing that the contract, the subject-matter of the suit, was made in Ireland. R. *Ahearne v. Harney* 479
3. A receiver appointed by the Court of Chancery in an adverse suit, is not the receiver of the inheritance within the meaning of the 4 & 5 W. 4, c. 82. E. E.—*Anonymous* 501
4. The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute service of the subpoena to appear on the law agent of the defendant *Ibid*

SETTING DOWN CAUSE.

See PRACTICE, 1.

SETTLEMENT.

See DEEDS, I., 1, 2.

SHEWING CAUSE.

See ORDER.

SOLICITOR.

As to his Costs—*See* COSTS, II.

See, also, SALES JUDICIAL, I., 1, 2.

SEQUESTRATION, 2.

1. A Solicitor having answered the matter of a petition against him, pursuant to an order of the Court, is not entitled to move that the petition be dismissed with

costs, for want of prosecution, until one clear Term has elapsed after notice of the answering affidavit. *R. Bucks v. Murphy* 373

2. M. being solicitor and general law agent for L., and having lately received from him £3000 in full discharge of all demands for costs, &c., lent him £500, for which the latter passed his bond and warrant, but subject as now alleged to an agreement, that judgment was not to be entered upon the bond, and that the loan was to be repaid out of a sum of £600 which M. was about to receive as L.'s attorney on account of the fine for a lease to be granted by L.—M. received the £600 as attorney for L., and retained out of it £500: but L. having died soon afterwards, M., in two days after L.'s death, entered judgment upon the bond, and assigned it for full and valuable consideration, and the amount was now claimed by the assignee out of L.'s estate. It was not alleged that L. had incurred any further liability for costs to M. after payment of the £3000. L. had little personal property but was seized of large real estates, and by his will devised all his property to trustees, and appointed a sole executrix who proved the will. Upon a petition presented by the sole acting trustee of the will, without the executrix, stating the foregoing facts as to the loan and agreement between M. and L., &c., and setting forth a letter purporting to be from M. to L., and of equal date with the bond, as evidence of the agreement, and praying that M. might be ordered to pay over the £500, part of the £600 received by him, in satisfaction of the judgment: *Held*, that the Court had jurisdiction to make the order; but M. having positively sworn that the letter stated in the petition and afterwards exhibited to him before making his affidavit, was a forgery, and contrary to the agreement between him and L., which, as he alleged, was that the £500, part of the £600, was to be retained by him on account of an accommodation bill for £500 which he had accepted for L., and not in repayment of the loan for which the bond was passed; and it appearing that such alleged bill, though it must have been more than a year and a half over-

due, had never been presented for payment either to M. or to the trustees or executrix of L.'s will, and it not appearing that such bill had ever been negotiated, or in whose hands it now was, the Court directed an issue to try the question whether the letter stated in the petition was in M.'s handwriting or not; and the jury having found that it was in his handwriting, the Court ordered M. to pay the amount of the judgment so entered and assigned by him, together with the petitioner's costs of the issue and of the several petitions in this matter *Ibid*

3. The final decree directed a sale for payment of certain demands and costs according to priority, and as to the defendant A. B., it was ordered that he should have his costs out of the residue, if any. Afterwards, on the plaintiff's motion that A. B.'s solicitor should bring in the title-deeds, &c., in his hands, relating to the lands about to be sold under the decree, it appeared that A. B. was insolvent, that the fund would be deficient, and it was alleged that the costs in the cause for which the solicitor claimed a lien, were incurred in proceedings by which the fund distributable under the decree had been increased in a very large degree. The solicitor was ordered to bring in the deeds, &c., but it was referred to the Master to ascertain the sum due to him for costs, and to inquire and report how far they had been incurred in proceedings by which the fund distributable had been increased. The Master reported upwards of £300 to be due to the solicitor for costs of proceedings whereby the fund distributable had been increased by upwards of £10,000. On the solicitor's motion for payment out of the fund of the sum reported due, and for the costs of the reference and of the motion:—*Held*, that the costs in question being in the nature of salvage costs, should have been specially secured by the decree, and that the decree may have been amended in that particular. *Held*, also, that under such circumstances the Court should not have been justified in taking the title-deeds, &c., from the solicitor, without requiring his costs to be paid to him, and that, notwithstanding

the form of the decree and that the fund was deficient, his motion should be granted. *R. Grey v. Mathews* 530
See, also, notes, 533, 534

STATUTES.

For the construction of the Church Temporalities Acts, see the judgments of Brady, C. B., and Pennefather, B., in *Dockrill v. Dolan* 558, 562

PARTICULAR STATUTES CITED OR COMMENTED ON.

William III.

8, 9, c. 11, s. 8, *Eng.* Judgments 154
Anna.

2, c. 6, s. 14, *Ir.* Penal Laws—Judgments 403

6, c. 2, Registry Act 78, 85, 97

11, c. 2, *Ir.* Landlord and Tenant—Redemption 293, 309, 319

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4, c. 5, *Ir.* Landlord and Tenant—Redemption 293

8, c. 2, *Ir.* Redemption by mortgagees 289

8, c. 4, *Ir.* Limitation of suits 73, 185, 394

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6, c. 9, Commission of perambulation 161

7, c. 14, s. 9, Solicitor—Costs 103

29, c. 15, *Ir.* Bankers 246

33, c. 14, *Ir.* Banker's Act 232, 405, 516

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11, 12, c. 8, s. 4, *Ir.* Bankruptcy 154

11, 12, c. 10, *Ir.* Mortgage—Receiver 433

11, 12, c. 31, *Ir.* Grand Canal Company 36

21, 22, c. 16, *Ir.* Bank of Ireland and Bankers 247

23, 24, c. 22, *Ir.* Usher's Poundage 201

28, c. 35, *Ir.* Execution of deeds 478

40, c. 76, *Ir.* Charitable Donations 326

49, c. 121, ss. 3, 4, Bankruptcy 585

53, c. 143, *Ir.* Grand Canal Company 29

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6, c. 16, *Eng.* Bankruptcy 154

6, c. 42, *Ir.* Banker's Act 232, 516

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1, c. 47, ss. 10, 11, *Ir.* Execution of Deeds—Minors 64, 65, 340

—, s. 13, *Ir.* Debts—Real Estate 517

1, c. 60, s. 22, *Ir.* Trustees 497

2, c. 33, Service of process 190

3, 4, c. 27, *Ir.* Limitation of suits 70, 179, 386, 390

3, 4, c. 37, *Ir.* Church Temporalities 552, 601

3, 4, c. 105, *Ir.* Dower Act 599

4, 5, c. 78, *Ir.* Execution of Deeds 474

4, 5, c. 82, *Ir.* Service of Process 190, 383, 105

4, 5, c. 90, *Ir.* Church Temporalities 552, 601

5, 6, c. 55, *Ir.* Receiver on judgment 55, 121, 153, 202, 395, 426, 492, 504, 527, 564

6, c. 14, *Ir.* Bankruptcy 153, 585

6, 7, c. 99, *Ir.* Church Temporalities 552, 601

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1, 2, c. 109, s. 16, *Ir.* Tithe Composition 61

—, s. 32, *Ir.* Tithe Composition 135

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2, 3, c. 61, *Ir.* Shannon Navigation 355

3, 4, c. 105, s. 22, *Ir.* Judgments—Charges 395

—, s. 26, *Ir.* Interest—Judgments 393

—, ss. 27, 29, Remedy upon Decrees, &c. 565

3, 4, c. 107, s. 1, *Ir.* Insolvent 471

STOCK.

Dividends of small amount, which have accrued due on a sum of stock, ordered to be transferred to a party, between the date of the order and the transfer of the stock, will be ordered to be paid to the attorney of the party who was authorised to accept the transfer. The application was made shortly after the transfer. *E. E. Pidgeon v. D'Alton* 134

SUBPENA TO APPEAR AND ANSWER.

See SERVICE.

Where costs were decreed to be paid by a plaintiff to a defendant who died after the decree and before the costs were

taxed, and his administrator issued a summons to tax the costs, upon which the solicitor for the plaintiff attended, and protesting against the right of taxation, reduced the items in the bill, and made no application to the Court within a period fixed by the Master for that purpose;—*Held*, that a subpoena to compel the payment of those costs was not irregular. Affirming the decision of the Master of the Rolls, *ante*, 18. C.—*Barry v. Stawell* 146
See, also, *Hutchins v. Hutchins* 217

SUPPLEMENTAL BILL.

See PLEADING, I.—*Bill*, I., 2, 3.

TAKING OFF THE FILE.

See PLEADING, III.—*Answer*, II., 1.

TAXATION OF COSTS.

See COSTS, II.

TENANT FOR LIFE.

See ESTATE.

TENANTS UNDER THE COURT.

See INJUNCTION, 3.

1. An application for an injunction to put out of possession a tenant under the Court, the cause having suddenly terminated, must be on notice to the tenant, such tenant is in the nature of a tenant at will, and is entitled to emblements. E. E. *O'Connell v. O'Callaghan* 199
2. Where lands, let under the Court for seven years pending the cause, are sold under the decree and the tenancy is determined before the expiration of the term, the purchaser having notice of the tenancy at the time of the sale, and going into possession, is not entitled to the crops sown by the late tenant and growing on the lands; the late tenant is entitled to emblements, and his right is not affected by the custom of the country as to the outgoing tenant's right after the expiration of his lease. R. *Creed v. Creed* 207
3. *Seem*, if, in such case, the purchaser insists upon retaining the crops, the Court will direct, a reference at his expense as to the value of the crop and the damage sustained by the late tenant in relation thereto *Ibid*

4. A distraining order will not be granted, unless it appear by affidavit that the receiver personally demanded the rent to be distrained for, from the tenants: but it is not necessary that the affidavit should state in terms, that he *personally* demanded the rent, if it state facts from whence it appears to the Court that the demand was personally made. E. E. *Langley v. Aylmer* 492
5. A tenant under a letting made by the Court, for seven years pending the cause, who has been put out of possession by the injunction of the purchaser in the interval between two gale days, is bound to pay a rent for the period he continued in occupation subsequent to the last gale day: and it will be referred to the Remembrancer to ascertain what is the amount of such rent, having regard to the season of the year when the broken gale occurred, and the nature of the demised premises. E. E. *Jameson v. Farrer* 513

TITHES.

See AMENDMENT.

1. Under 1 & 2 Vic. c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards in respect of the tithe rent-charge, and who have given notice in the manner specified by the act, Quarter Sessions may vary the rent-charge according to the price of corn.—An order reducing the rent-charge recited that “Whereas due notice having been first by them given, three owners and occupiers of land in the parish of T., &c., each charged with payment of £3 and upwards in respect of the rent-charge payable in lieu of the composition for tithes made by certificate of, &c., applied to the Justices of the Peace at Quarter Sessions,” &c. Afterwards the Incumbent proceeded by petition under the 30th section of the act, to recover the rent-charge which accrued from the gale day after the order of Sessions, as if no reduction had taken place; and a rule *nisi* for a receiver having been obtained, the respondent came in to shew cause against it, relying upon the order of the Quarter Sessions; *Held*, that the recitals in the order were not evidence of the facts thereby stated; and, as it now appeared that one of the

- three persons who signed the notice, and upon whose application the order was made, was not an owner or occupier of land in the parish, nor charged with payment of any portion of the rent charge; *Held*, that the Quarter Sessions had not jurisdiction, and that the order was a nullity. *R. Thompson v. Shiel* 135
2. A sequestrator appointed over a parish, at the suit of certain judgment creditors of the Incumbent, presented a memorial under the 1 & 2 Vic. c. 109, for arrears of tithe composition due before the sequestration issued, and a certain sum was accordingly lodged in the Treasury on account of those arrears; but before the payment, the Incumbent died, and the memorial having stated, by mistake, as it was alleged, that he was the person entitled to the arrears, his personal representative claimed the money in the Treasury against the sequestrator, and the Officer consequently refused to pay either party without the order of this Court. Whereupon, a bill was filed in the names of the sequestrator and the judgment creditors, in whose behalf he was appointed, as co-plaintiffs, against the personal representative of the Incumbent, stating the foregoing facts, and praying that the sequestrator might be decreed to be the person entitled to receive the money in the Treasury; *Held*, that a general demurrer should be allowed to the bill upon two grounds:—first, that the sequestration was not retrospective, but attached the future accruing tithe only; and, therefore, did not entitle the plaintiffs to the money in the Treasury; secondly, that, at any rate, the sequestrator could have had no interest or title in this suit, and should not have been made a co-plaintiff. *R. Egan v. Heenan* 50

TITLE.

See SALES JUDICIAL, *passim*.

TITLE DEEDS.

See SALES JUDICIAL, I., 1, 2.
SOLICITOR, 3.

TRUSTS AND TRUSTEES.

See BANK AND BANKERS, 2, 3, 4.
SALES JUDICIAL.

I.—Generally.

1. Where a trust is created by will for the payment of debts, the right of a judgment creditor to the benefit of that trust is not affected by the 40th section of the 3 & 4 W. 4, c. 27. *C. Dillon v. Cruise* 70
2. The Banker's Act, 33 G. 2, c. 14, is not repealed by the 6. G. 4, c. 42; and therefore upon the stoppage of payment by a Joint Stock Banking Company formed under the latter statute, a trust is created in favour of the creditors, and affecting all the property of the shareholders, under the Banker's Act, which may be administered by this Court at the suit of any creditor against the Public Officer of the Company, instituted without making the other creditors or the shareholders parties; it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities of the Company, and it not appearing that the shareholders have any other liabilities than those of their co-partnership. *R. Fawcett v. Hodges* 232
3. By marriage articles, the intended husband covenanted with the trustees that a certain sum of money should be vested in the trustees, and the survivor of them and the executors and administrators of such survivor, for ever, upon the trusts specified in the articles. The marriage was celebrated, and the husband, with the assent of the trustees, obtained possession of the money; *Held*, in a suit for the administration of the assets of the husband, that the trustees were entitled to rank as specialty creditors of the husband, in respect of that sum of money *E. E. Jameson v Farrer* 346
4. By marriage settlement, a sum of £5000 was vested in trustees upon trust to permit the wife, in case she should survive her husband, to receive the interest thereof during her life; and in case there should be no issue of the marriage, in trust for the husband absolutely: with power to the trustees, with the consent of the husband and wife, to invest the money in Government or on real security. The money was afterwards, with consent of the husband and wife, lent upon mortgage; the husband died without issue, and by his will, bequeathed his interest in

the £5000 to A. upon certain trusts, and appointed him his executor; the wife afterwards married B; and upon her marriage, the interest on the £5000 was assigned to A. upon trust to pay the yearly interest on the £5000 to the wife for life; and A. covenanted with the wife that he, his executors, &c., would stand possessed of the premises assigned to him upon the trusts therein mentioned. The £5000 was paid to A. out of the produce of a sale had in a suit in which he was a defendant, and A. represented to B.'s wife that he had invested the money upon Government security; and paid her interest according to the rate it would have borne if it had been so invested. The money was not in fact so invested, but was applied by A. to his own use; *Held*, in a suit for the administration of A.'s assets, that the new trustee of B.'s last marriage settlement, was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the £5000 calculated at £6 per cent.;—and, also (there being a deficiency of the assets to pay the £5000 which was a debt by simple contract) as a specialty creditor for any future deficiency in the interest, calculated at £6 per cent. E. E. *Ibid*

II.—Appointment of New Trustees.

1. A trustee of chattels real and of stock, having acted in the trusts, died, and appointed executors resident within the jurisdiction who proved his will, but never acted and refused to act in the trusts, which were still continuing; *Held*, that the Court had jurisdiction to appoint new trustees under the 1 W. 4, c. 60, s. 22. E. E. *Muley v. Smiths* 497
2. The original trustee having committed a breach of trust, the Court appointed new trustees, the executors of the old trustee undertaking to replace the trust fund *Ibid*
3. "In the case of a recent trust, the 22nd section of the act places a deed which does not contain a power to appoint new trustees in the same situation as a deed containing such a power in the instances mentioned in the former sections." *Per Pennefather, B.*, in *Ibid* 498

USHER'S POUNDAGE.

See SALES JUDICIAL, I., 3.

VENDOR AND PURCHASER.

See SALES JUDICIAL, passim.

1. "The doctrine of *Taylor v. Stibbert* (2 Ves. jun. 440) is this, that if a tenant for life makes leases not warranted by his power, a party purchasing from him with notice of those, shall not be permitted afterwards to evict them, and thereby render the assets of the tenant for life liable for that eviction." *Per Lord Plunket in Steele v. Mitchell* 11
2. Where lands are purchased by Commissioners under the 2 & 3 Vic. c. 61, for the purposes of the act, and the purchase-money is lodged in Court, the Court will, under the words "reasonable costs, charges and expenses," in the 29th section, award to the parties entitled, the costs necessarily incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject. R. *In re The Commissioners of the River Shannon* 355

WAIVER.

See EVIDENCE, III., 2, 3.

INJUNCTION, 2.

LIMITATIONS, STATUTE OF, 2, 7.

WASTE.

See INJUNCTION, 3, 4.

LANDLORD AND TENANT, II.

This Court may interfere at the suit of the Crown to restrain a Bishop from wasting the property of the See, or at the suit of the patron of a living, to restrain the Incumbent from wasting the glebe-house or lands; but *semble* as to the church and church-yard, the Ecclesiastical Court having *ratione loci* the proper jurisdiction, this Court has never interfered to restrain the acts of the Incumbent with respect to them. R. *Earl of Fitzwilliam v. Moore* 615

WILL.

See LIMITATIONS, STATUTE OF, 1.

1. A gift of personal annuities to A. and B. "for themselves and their children," they not having any at the date of the will or death of the testator, gives them the absolute interest. C. *Heron v. Stokes* 163

2. Under a bequest, "to be equally divided between my sister and her daughters, and my sister-in-law and her children," the property is to be distributed *per stirpes* and not *per capita*. *Ibid*
3. "It is abundantly clear that a bequest substituted for another, which has failed to take effect, is subject to the same conditions, and is to be construed in the same way, as that for which it is substituted." C. *Per* Lord Plunket, in *Ibid* 169
4. W. L. bequeathed to his daughter E. the sum of £500 to be laid out and disposed of for her benefit as thereafter directed; and he directed that the said sum of £500 be invested in Government stock, in trust that his executors, when convenient and eligible purchases offer, should lay out the same in the purchase of lands in Ireland, or of rent-charges, annuities, or other beneficial estates and interests; and thereupon to settle the same to the several uses, and subject to the powers, provisions and limitations thereafter mentioned (as far as the nature of the several estates or interests to be purchased and other contingencies would admit of), that is to say, in trust well and sufficiently to settle the estates to be purchased; and to begin payment of the rents of the estates or property to be purchased for the use and benefit of his daughter as soon as she should attain the age of twenty-one years, or be married; and further, well and sufficiently to settle and secure the estates or property upon her marriage so that the same, or any part thereof, should not be liable or subject to the control or intermeddling of any husband she might intermarry with; without the same, or any part thereof, being subject or liable to the debts, forfeitures or engagements of her husband; with full power to his daughter, notwithstanding her coverture, to dispose of by her will the estates and property to be purchased, as she should think fit.—The daughter married after attaining the age of twenty-one. No settlement was executed upon her marriage. The £500 was paid into Court by the executors in a suit instituted for the purpose. Upon an application by the husband and wife

- to have the money paid out to them; *Held, Per* Pennefather, B., and Foster, B.—That the daughter took but an estate for life in the lands to be purchased, with power to dispose of them by will. *Per* Pennefather, B., and Richards, B.—That the testator had manifested an intention that the interest given to his daughter should be settled to her sole and separate use independent of her husband, and that she should not have a power of alienation. *Per Curiam*.—That the husband and wife were not entitled to be paid the £500. E. E. *Marken v. Magrath* 566
5. "The restriction against alienation, which is certainly inconsistent with the gift of an estate to a male, and, therefore, not allowed in such a case, will be upheld in favour of a female against her future husband, whether she be unmarried at the time, or being married, becomes afterwards discover, and marries a second husband." *Per* Pennefather, B., in *Ibid* 571
 6. Testatrix devised all her freehold and leasehold estates to A. for life, remainder to B. for life, remainder (except as to a certain rent) to the Commissioners of Charitable Donations and Bequests, upon trust to renew leases and apply rents, &c., and appointed A. and B. executors of her will; *Held*, that A. and B. took beneficial estates respectively for life. R. *Commissioners of Charitable Donations v. Espinasse* 324
 7. The Commissioners of Charitable Donations filed a bill against A. and B., seeking for a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix, and all her personal estate and effects, &c., and praying that an account might be taken of her freehold and leasehold estates, &c., and that the title deeds relating thereto might be brought into Court. The bill did not state that the personal assets of the testatrix were insufficient for the payment of her debts, but it averred that the defendants had paid a specific bequest in her will mentioned. Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real), allowed. R. *Ibid*

